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Punitive Damages in Products Liability Litigation

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DAVID G. OWEN

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PUNITIVE DAMAGES IN PRODUCTS LIABILITY LITIGATION

David G. Owen*†

I. INTRODUCTION

Manufacturers have a powerful hold over the means for discovering and correcting product hazards.¹ Through the processes of design, testing, inspection and collection of data on product safety performance in the field, the manufacturer has virtually exclusive access to much of the information necessary for effective control of dangers facing product consumers. Indeed, the strict principles of modern products liability law evolved in part to motivate manufacturers to use this information to help combat the massive problem of product accidents.²

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1. See NATIONAL COMMISSION ON PRODUCT SAFETY, FINAL REPORT 3-4 (1970) [hereinafter NCPS FINAL REPORT]; 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* 756-57 (1956); Kessler, *Products Liability*, 76 YALE L.J. 887, 927 (1967); Noel, *Comparison of Strict Liability in Products Area and Auto Accident Reparations*, in *THE ORIGIN AND DEVELOPMENT OF THE NEGLIGENCE ACTION* 79 (U.S. Dept. of Transp. 1970).

2. See, e.g., Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C. L. REV. 803, 809-10 (1976); Morris, *Negligence in Tort Law—With Emphasis on Automobile Accidents and Unsound Products*, 53 VA. L. REV. 899, 908-09 (1967).

The National Commission on Product Safety estimated in 1970 that 20 million Americans are injured in the home each year in product accidents. See NCPS FINAL REPORT, *supra* note 1, at 1. In addition, it has been estimated that as many as seven million workers annually are injured in product accidents on the job. See Weinstein, Twerski, Piehler & Donaher, *Product Liability: An Interaction of Law and Technology*, 12 DUQUESNE L. REV. 425 (1974), citing PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH (May 1972). A recent survey of the National Center for Health Statistics estimated that over 62 million accidents occurred in this country in 1974. See NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 2 (1975). Since the estimate of the National Commission on Product Safety excluded accidents from foods, drugs, cosmetics, motor vehicles, insecticides, firearms, cigarettes, radiological hazards, and certain flammable fabrics, NCPS FINAL REPORT, *supra* note 1, at 1 n.*, it may be conservatively estimated that the total annual figure for product accidents exceeds 30 million injuries and perhaps is considerably greater. The National Safety Council has estimated the national cost of all accidents at \$43.3 billion for 1974. See NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 4 (1975). Approximating

Most manufacturers, both from a desire to avoid liability and from a generalized sense of social responsibility, prudently use their resources to prevent excessively hazardous products³ from reaching or staying on the market. On occasion, however, manufacturers abuse their control over safety information and market defective products in flagrant disregard of the public safety. One manufacturer of color televisions, for example, included in each set a high voltage transformer it knew was prone to catch fire and, when informed that its sets were causing frequent fires, refused to spend the one dollar per unit it knew would eliminate the hazard.⁴ In another case, a major drug company submitted fabricated test data to the Food and Drug Administration to obtain approval for the sale of a dangerous new drug. Approval was granted, and approximately 500 persons developed cataracts as a result.⁵

The strict liability theory of modern products liability law explicitly addresses the loss distribution problems that arise when an injury is caused by a defective product marketed by an "innocent" manufacturer, since liability is imposed even though the manufacturer has exercised due care.⁶ But the principles of strict liability are ill-equipped to deal with problems at the other end of the culpability scale where an injury results when a manufacturer markets its products in intentional or reckless disregard for consumer safety. Nor has the criminal law filled this void.⁷ A legal tool is needed that will help to expose this type of gross misconduct, punish those

the figure for product accidents at one half the total for all accidents, the current annual cost of product accidents may exceed \$20 billion.

3. "The most persistent issue in the law of torts is the determination of when an actor has imposed excessive risk of harm on another." C. FRIED, *AN ANATOMY OF VALUES* 257 (1970). See O. HOLMES, *THE COMMON LAW* 144-46 (1881). The hazards in a product are considered to be "excessive," for the purposes of this article, when the product is marketed in a "defective condition." The difficult issue of when a product's condition may properly be characterized as defective is beyond the scope of the present article. Roughly speaking, in this article, a product is considered to contain excessive hazards and thus to be defective if it is marketed in a condition that generates more accident costs than social utility. Stated otherwise, a product is defective if the costs of improving its safety are less than the benefits resulting from the improvement. See note 169 *infra* and accompanying text. However, the principles of punitive damages developed in this article are of general application and are not dependent upon any particular definition of defectiveness.

4. See *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975); notes 474-80 *infra* and accompanying text.

5. See *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967); notes 336-51 *infra* and accompanying text; cf. *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967).

6. See *RESTATEMENT (SECOND) OF TORTS* § 402A(2)(a) (1965).

7. See note 156 *infra* and accompanying text.

manufacturers guilty of such flagrant misbehavior, and deter all manufacturers from acting with similar disregard for the public welfare. The punitive damages remedy is such a tool.

Whether punitive damages may appropriately and usefully be awarded in products liability litigation is a question that has remained remarkably unexplored by both courts⁸ and commentators.⁹ The dearth of judicial analysis in this area can be explained in part by the important 1967 Second Circuit decision in *Roginsky v. Richardson-Merrell, Inc.*¹⁰ Striking down a punitive damages award of \$100,000 to a person who had developed cataracts as a result of the defendant drug company's fraudulent marketing practices, Judge Friendly delivered a characteristically powerful opinion outlining three apparent drawbacks to extending the punitive damages remedy to products liability litigation: (1) the inequity of punishing the innocent shareholders of a manufacturer for the misdeeds of its low-level employees; (2) the probability that a manufacturer will insure against the risk of punitive damages assessments, and that the deterrent value of the remedy will thus be eviscerated; and (3) the risk that a manufacturer may be excessively punished or perhaps even bankrupted by punitive damages verdicts in multiple actions for marketing a single defective product.¹¹

8. Only one decision has generally explored the issue. *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967). Cf. *G.D. Searle & Co. v. Superior Ct.*, 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975); *Pease v. Beech Aircraft Corp.*, 38 Cal. App. 3d 450, 466, 113 Cal. Rptr. 416, 427 (1974).

9. Other published articles examining this topic are Abramson, *Punitive Damages in Aircraft Accident Cases—A Debate*, 11 THE FORUM 50 (1975); DuBois, *Punitive Damages in Personal Injury, Products Liability and Professional Malpractice Cases: Bonanza or Disaster*, 43 INS. COUNSEL J. 344 (1976); Haskell, *The Aircraft Manufacturer's Liability for Design and Punitive Damages—The Insurance Policy and the Public Policy*, 40 J. AIR. L. & COM. 595 (1974); Tozer, *Punitive Damages and Products Liability*, 39 INS. COUNSEL J. 300 (1972); Note, *Allowance of Punitive Damages in Products Liability Claims*, 6 GA. L. REV. 613 (1972). Cf. Silliman, *Punitive Damages Related to Multiple Litigation Against a Corporation*, 16 FED. OF INS. COUNSEL Q. 91, No. 3 (1966). See also Nolan, *Punitive Damages—A Controversial New Area of Products Liability—A Capsule Study*, in PRODUCTS LIABILITY—LAW, PRACTICE, SCIENCE 6:18 (S. Schreiber & P. Rheingold eds. 1967); Annot., 29 A.L.R.3d 1021 (1970).

An unpublished paper on the topic was delivered at the 1975 annual convention of the Association of Trial Lawyers of America, in Toronto, Canada: Lloyd, *Punitive Damages: A Social Imperative—A Survey of Recent Developments in Punitive Damages in Product Liability Litigation*. An excellent, early treatment is West, *Some Contemporary Corporate Problems Concerning Punitive Damages*, 1967 (unpublished LL.M. seminar paper on file at *Michigan Law Review*).

10. 378 F.2d 832 (2d Cir. 1967).

11. 378 F.2d at 838-50.

Roginsky appeared for some time to have laid the matter to rest.¹² But there are indications that an increasing number of plaintiffs in products liability actions are now making claims for punitive damages and are sometimes prevailing.¹³ Juries have recently assessed punitive damages verdicts against product manufacturers in amounts of \$17.25 million, \$10.5 million, and \$5 million.¹⁴ The question of the proper use of punitive damages in products liability cases is thus of major significance to manufacturers and their liability insurers, the general public, and the courts asked to resolve this issue.¹⁵

This article will first explore the doctrine of punitive damages and its compatibility with the theories of products liability. The functions of punitive damages and their applicability in the products liability context will then be examined, with particular consideration given to the three complicating factors raised by Judge Friendly in *Roginsky*. In the following section attention will focus on the various contexts in which manufacturer misconduct has arisen in the reported decisions and a number of unreported cases that have involved this issue. Finally, guidelines will be developed from these cases for determining the appropriateness of punitive damages awards in individual products liability cases. The article concludes that punitive damages may be usefully employed in products liability litigation to punish and to deter the marketing of defective products in flagrant disregard of the public safety.

12. With the exception of *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967), handed down only two months after *Roginsky*, there have been only two recent reported cases involving personal injuries in which jury awards of punitive damages against product manufacturers have been upheld on appeal: *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975); *Moore v. Jewell Tea Co.*, 46 Ill. 2d 288, 263 N.E.2d 103 (1970), *affg.* 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969).

13. "[M]anufacturers continue to be faced today with increasing punitive damages claims at the trial court level" Haskell, *supra* note 9, at 618. See notes 333, 334 *infra*.

14. The cases, respectively, were *Pease v. Beech Aircraft Corp.*, 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (1974); *Rosendin v. Avco Lycoming Div.*, No. 202,715 (Super. Ct. Santa Clara County, Calif., March 8, 1972) (unpublished opinion, June 7, 1972), *affd.*, No. 32,999, Cal. App., 1st Dist., Feb. 24, 1976, *cert. denied*, Sup. Ct. Cal. (1976); *Hayman v. Arcoa, Inc.*, Civil No. 70-3226 (20th Jud. Cir. St. Clair County, Ill., filed Apr. 30, 1970). The awards were stricken by the trial courts in the first two cases and allowed to stand in the third. See notes 333, 334 *infra*.

15. Several cases squarely presenting the issue of the propriety of punitive damages awards in products liability litigation are presently pending appeal. See note 334 *infra*.

II. THE DOCTRINE AND FUNCTIONS OF PUNITIVE DAMAGES

A. *The Doctrine of Punitive Damages and Its Compatibility with Theories of Products Liability*

1. *The Doctrine of Punitive Damages*

The doctrine of punitive damages,¹⁶ with deep roots in ancient law¹⁷ and in medieval English statutes,¹⁸ first received explicit recog-

16. The classic article on punitive damages generally is Professor Morris' *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931). Other articles of particular note include Friedman, *Punitive Damages in Tort*, 48 CAN. B. REV. 373 (1970) (English and Canadian law); Lambert, *The Case for Punitive Damages (Including Their Coverage by Liability Insurance)*, 35 ASSN. OF TRIAL LAW. OF AM. L.J. 164 (1974) (collecting the literature); Morris, *Rough Justice and Some Utopian Ideas*, 24 ILL. L. REV. 730 (1930); Morris, *Punitive Damages in Personal Injury Cases*, 21 OHIO ST. L.J. 216 (1960); Rice, *Exemplary Damages in Private Consumer Actions*, 55 IOWA L. REV. 307 (1969); Walther & Plein, *Punitive Damages: A Critical Analysis: Kink v. Combs*, 49 MARQ. L. REV. 369 (1965); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517 (1957); Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. REV. 1158 (1966); Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408 (1967); Note, *The Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees*, 70 YALE L.J. 1296 (1961). See also D. DOBBS, *LAW OF REMEDIES* § 3.9 (1973); C. MCCORMICK, *LAW OF DAMAGES* ch. 10 (1935); 1 T. SEDGWICK, *MEASURE OF DAMAGES* ch. 16 (9th ed. 1912).

17. "Multiple damages are a common feature of early legal systems . . ." D. PUGSLEY, *THE ROMAN LAW OF PROPERTY AND OBLIGATIONS* 31 (1972). Since multiple damages are awarded to a plaintiff in an amount equal to a legislatively prescribed multiple of his actual damages, they are plainly a form of punitive damages. This fact has been expressly recognized by some courts, see, e.g., *Stovall v. Smith*, 43 Ky. 378 (1844), and commentators, see, e.g., G. DRIVER & J. MILES, *THE BABYLONIAN LAWS* 500 (1952); W. HOWE, *STUDIES IN THE CIVIL LAW* 192 (1896); 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF THE ENGLISH LAW* 522 (2d ed. 1899). It has been overlooked by others, see, e.g., Walther & Plein, *supra* note 16, at 369 n.6, and has been generally ignored in the long dispute over the punitive damages doctrine. That treble damages under the antitrust laws are in the nature of punitive damages and achieve similar objectives has long been recognized. See, e.g., *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F.2d 580, 582 (8th Cir. 1945); *United Copper Sec. Co. v. Amalgamated Copper Co.*, 232 F. 574, 577 (2d Cir. 1916). See Stoll, *Penal Purposes in the Law of Tort*, 18 AM. J. COMP. L. 3, 14 (1970). See generally R. POSNER, *ECONOMIC ANALYSIS OF LAW* 360-62 (1972). But cf. Vold, *Are Threefold Damages Under the Anti-Trust Act Penal or Compensatory?*, 28 KY. L.J. 117 (1940).

Once it is recognized that multiple damages are merely one statutory form of punitive damages, the depth of the historical foundation underlying punitive damages becomes astounding. Multiple damages were provided for in Babylonian law nearly 4000 years ago in the Code of Hammurabi, the earliest known legal code. G. DRIVER & J. MILES, *supra*, at 500-01. They were provided for in the Hittite Laws of about 1400 B.C., M. BELL, *MODERN DAMAGES* 75 (1959), and in the Hebrew Covenant Code of Mosaic law of about 1200 B.C., *Exodus* 22:1. See R. PFEIFFER, *INTRODUCTION TO THE OLD TESTAMENT* 210 (1948); J. SMITH, *THE ORIGIN AND HISTORY OF HEBREW LAW* 16 (1960). The Hindu Code of Manu of about 200 B.C. also provided for multiple damages in at least one case. M. BELL, *supra*, at 84.

The very basis of early Roman civil law, beginning with the Twelve Tables of 450 B.C., was punitive in nature, see W. BUCKLAND & A. MCNAIR, *ROMAN LAW AND COMMON LAW* 344-45 (2d rev. Lawson ed. 1965); R. LEAGUE, *ROMAN PRIVATE*

dition by the English common law in 1763.¹⁹ The doctrine was rapidly transported to America²⁰ and by the middle of the nineteenth century had gained substantial acceptance in this country.²¹ Though beset by a history of stormy controversy,²² the doctrine has become

LAW 361 (2d ed. 1951); R. LEE, *THE ELEMENTS OF ROMAN LAW* 377 (4th ed. 1956); M. RADIN, *ROMAN LAW* 127 (1927), and several provisions in classical Roman law prescribed double, treble, and quadruple damages, see W. BUCKLAND, *A TEXT-BOOK OF ROMAN LAW* 581-84 (3d rev. Stein ed. 1966). "Delictual actions were classified as penal (*ad poenam persequendam*) by contrast with all other actions . . . and . . . the essential distinction is to be found in the punitive or vindictive character of the penal action The purpose of the action being punitive, it was irrelevant that in this way the victim would be paid several times over." B. NICHOLAS, *ROMAN LAW* 210 (1962). Assertions that punitive damages were unknown to the Roman law thus appear to rest upon a dubious foundation. See, e.g., 1 T. SEDGWICK, *supra* note 16, at 701; Walther & Plein, *supra* note 16, at 369. See also *Fay v. Parker*, 53 N.H. 342, 355 (1873); 2 S. GREENLEAF, *THE LAW OF EVIDENCE* 246 n.2 (16th ed. 1899).

18. The first English statutory provision for multiple damages appears to have been enacted by Parliament in 1275. "Trespassers against religious persons, shall yield double damages." Synopsis of Statute of Westminster I, 3 Edw. 1, c. 1, vol. 1, in 24 *STATUTES AT LARGE* 138 (Pickering Index 1761). Including this first statute, Parliament enacted a total of sixty-five separate provisions for double, treble, and quadruple damages between 1275 and 1753. See *id.* at 138-41. See also 2 F. POLLOCK & F. MAITLAND, *supra* note 17, at 522 (referring to these provisions as "penal and exemplary damages").

19. Reputedly, the case that first articulated a theory of "exemplary" damages in English law is *Huckle v. Money*, 2 Wils. 205 (K.B. 1763). See also *Wilkes v. Wood*, 1 Lofft 1 (1763). It has been suggested that punitive damages were in fact, if not in name, awarded by English juries prior to the mid-eighteenth century, but that the appellate courts of that period did not take jurisdiction of questions involving the excessiveness of jury verdicts and so had no occasion to enunciate rules of exemplary or punitive damages. See T. SEDGWICK, *supra* note 16, § 347, at 687-89; Note, 70 HARV. L. REV. 517, *supra* note 16, at 518-19.

In *Day v. Woodworth*, 54 U.S. 363, 371 (1851), the Supreme Court, without citing specific authority, stated that the doctrine received support from "repeated judicial decisions for more than a century." This would indicate the existence of a punitive damages decision before 1751, twelve years prior to the decision in *Huckle*. Research has failed to uncover such a decision, and so it is assumed that the *Day* court was simply mistaken.

20. The first reported punitive damages decision in this country appears to be *Genay v. Norris*, 1 S.C. 3, 1 Bay 6 (1784), in which the plaintiff became ill after consuming a glass of wine containing a large quantity of Spanish Fly that the defendant had added as a practical joke.

21. See *Day v. Woodworth*, 54 U.S. 363, 371 (1851) (dictum); *Linsley v. Bushnell*, 15 Conn. 225, 235 (1842). For brief historical reviews of the doctrine, see 1 T. SEDGWICK, *supra* note 16, § 351; Note, 70 HARV. L. REV. 517, *supra* note 16.

22. The first and foremost debate over the doctrine's validity was between Sedgwick and Greenleaf. Compare 1 T. SEDGWICK, *supra* note 16, § 355, with 2 S. GREENLEAF, *supra* note 17, at 240 n.2. See 1 KENT'S COMMENTARIES ON AMERICAN LAW, Lecture 24(1), at 605-06 (11th ed. Comstock 1867); Walther & Plein, *supra* note 16, at 379-80.

The early debates were over whether civil damages should or could be awarded for other than purely compensatory purposes. Compare *Fay v. Parker*, 53 N.H. 342, 382 (1873) ("The idea is wrong. It is a monstrous heresy. It is an unsightly and unhealthy excrescence, deforming the symmetry of the body of the law"), with *Luther v. Shaw*, 157 Wis. 234, 238, 147 N.W. 18, 20 (1914) ("The law giving ex-

firmly established in the common law.²⁸

emplary damages is an outgrowth of the English love of liberty regulated by law. It tends to elevate the jury as a responsible instrument of government, discourages private reprisals, restrains the strong, influential and unscrupulous, vindicates the right of the weak, and encourages recourse to, and confidence in the courts of law by those wronged or oppressed by acts or practices not cognizable in, or not sufficiently punished by the criminal law"). The debate continues. Compare Ghiardi, *Should Punitive Damages Be Abolished?—A Statement for the Affirmative*, ABA INS., NEGL. & COMP. LAW SECTION 282 (1965), with Corboy, *Should Punitive Damages Be Abolished?—A Statement for the Negative*, ABA INS., NEGL. & COMP. L. SECTION 292 (1965).

23. By 1935 all states except four, Louisiana, Massachusetts, Nebraska, and Washington, had adopted some form of punitive damages. C. McCORMICK, *supra* note 16, at 278-79.

But the doctrine was rather severely restricted in England by a decision of the House of Lords in 1964, *Rookes v. Barnard*, [1964] A.C. 1129, which Professor Fleming called a renunciation of exemplary damages in English law. J. FLEMING, *THE LAW OF TORTS* 522 (4th ed. 1971). The *Rookes* decision provided that exemplary damages could thereafter be awarded in only three situations: (1) cases involving oppression of citizens by government employees; (2) cases in which the defendant intends to profit by his wrongful act despite the payment of actual damages; and (3) situations in which such damages are provided for by statute. See SALMOND ON THE LAW OF TORTS 546-49 (Heuston 16th ed. 1973). The appellate courts of Australia, Canada, Ireland and New Zealand have refused to follow *Rookes* and have insisted that the doctrine be given a wider interpretation. *Id.* at 547 n.26. See generally Hodgin & Veitch, *Punitive Damages—Reassessed*, 21 INTL. & COMP. L.Q. 119 (1972). The House of Lords, however, reaffirmed the *Rookes* restriction on punitive damages in 1972. *Cassell & Co. Ltd. v. Broome*, [1972] A.C. 1027 ("aggravated" damages should adequately achieve the legitimate objectives of exemplary damages in cases falling outside of the three *Rookes* categories).

Some scholars believe that the practical effects of the *Rookes* rule will not be too significant since plaintiffs are still permitted to recover "aggravated" damages. See J. FLEMING, *supra*, at 522 ("[A]ggravated" damages are so difficult to disentangle from 'exemplary' that the retention of the former without the latter is not apt to make much difference in practice"); Friedman, *supra* note 16, at 387-88 ("Is this not exemplary damages under another rubric?"); Stoll, *supra* note 17, at 3, 5, 14.

Damages that are "punitive" in nature are provided for by the civil codes of Switzerland, Turkey, Germany, Norway, and Mexico. See F. LAWSON, *NEGLIGENCE IN THE CIVIL LAW* 209, 212, 218 (1950 corrected ed.). See generally Stoll, *supra* note 17. In the United States, several states have statutes providing generally for punitive damages awards in appropriate tort cases. See CAL. CIV. CODE § 3294 (West 1970); COLO. REV. STAT. ANN. § 13-21-102 (1973); GA. CODE ANN. § 105-2002 (1968) ("additional" damages awardable in cases involving "aggravating circumstances"), GA. CODE ANN. § 105-2003 (1968) ("vindictive" damages awardable for injured feelings), construed in *Westview Cemetery, Inc. v. Blanchard*, 234 Ga. 540, 216 S.E.2d 776 (1975) (referring to section 105-2002 damages as "exemplary damages"); MONT. REV. CODE ANN. § 17-208 (1947); NEV. REV. STAT. § 42.010 (1975); N.D. CENT. CODE ANN. § 32-03-07 (1960); 23 OKLA. STAT. ANN. § 9 (1955); S.D. COMP. L. ANN. § 21-3-2 (1967).

In addition, several federal and state statutes provide expressly for punitive or multiple damages in a variety of specific situations. See, e.g., Clayton Act § 4, 15 U.S.C. § 15 (1970) (treble damages); Fair Credit Reporting Act, 15 U.S.C. § 1681 (n) (1970) (punitive damages); Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2520(c) (Supp. 1975) (wiretapping—punitive damages); Civil Rights Act of 1968, 42 U.S.C. § 3612(c) (1970) (punitive damages); CAL. CIV. CODE § 3340 (West 1970) (wrongful injuries to animals—punitive damages); IOWA CODE ANN. § 639.14 (1950) (malicious attachment—punitive damages); IOWA CODE ANN. § 709.14 (1950) (conversion of logs or lumber—double damages); MASS. GEN. LAWS ANN. ch. 231, § 93 (1959) (libel and slander—punitive damages); S.C. CODE

Punitive or exemplary damages²⁴ are assessed in addition to compensatory damages to punish the defendant for the commission of an aggravated or outrageous act of misconduct and to deter him and others from such conduct in the future.²⁵ A jury in its discretion²⁶ may render such an award²⁷ in cases in which the defendant injured²⁸ the plaintiff intentionally²⁹ or maliciously,³⁰ or in which the

ANN. § 66071.13 (Supp. 1974) (unfair or deceptive trade practices—treble damages); TEX. REV. CIV. STAT. art. 8306, § 5 (1967) (wrongful death of workman—punitive damages); UTAH CODE ANN. § 76-6-412 (Supp. 1973) (receiving certain stolen property—treble damages); VA. CODE ANN. § 8-650 (1950) (knowingly making unauthorized use of another's picture—punitive damages). Punitive damages have also been implied into a number of statutes. See, e.g., Federal Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970) (deprivations of civil rights under color of state law); Jones Act, 46 U.S.C. § 688 (1970) (wrongful death in admiralty).

24. The terms "punitive" and "exemplary" damages today are generally used interchangeably. Such damages have also been referred to as "punitory," "penal," "additional," "aggravated," "plenary," "imaginary," "presumptive," and sometimes as "smart money." See Freifield, *The Rationale of Punitive Damages*, 1 OHIO ST. L.J. 5 (1935). In the civil-law nations similar damages are referred to as "moral" damages, "satisfaction," or "private fines." See Stoll, *supra* note 17.

25. RESTATEMENT (SECOND) OF TORTS § 908(1) (Tent. Draft No. 19, 1973).

26. See *id.* § 908, comment *d* at 81. But see *Sample v. Gulf Ref. Co.*, 183 S.C. 399, 191 S.E. 209 (1937).

27. Despite the fact that punitive damages are assessed against a defendant largely for purposes of punishment, they are awarded to the plaintiff rather than to the state. This has prompted some to criticize such awards as "windfalls" to plaintiffs. See, e.g., *Walker v. Sheldon*, 10 N.Y.2d 401, 409, 179 N.E.2d 497, 501, 223 N.Y.S.2d 488, 494 (1961) (dissenting opinion). Some commentators suggest that such damages should go to the state. See, e.g., *Hodgin & Veitch*, *supra* note 23, at 132. For a discussion of the reasons for allowing the plaintiff to retain a windfall, see text at notes 152-203 *infra*.

28. Courts are divided on whether punitive damages should be recovered in actions brought under wrongful death acts. Compare *Pease v. Beech Aircraft Corp.*, 38 Cal. App. 3d 450, 461-63, 113 Cal. Rptr. 416, 423-24 (1974) (punitive damages not allowable under California wrongful death statute), with *Kritser v. Beech Aircraft Corp.*, 479 F.2d 1089, 1091 (5th Cir. 1973) (punitive damages allowable under Texas wrongful death act). While the majority of jurisdictions formerly prohibited recovery, see Annot., 94 A.L.R. 384 (1935), there is now a growing trend toward recovery, see S. SPEISER, *RECOVERY FOR WRONGFUL DEATH* § 3:4 (rev. ed. 1975). While the advisability of allowing punitive damages in wrongful death actions is generally beyond the scope of this article, it should be noted that a rule disallowing such damages in both wrongful death and survival actions would create a major loophole for manufacturers that would frequently contravene the important objectives of punitive damages. See *Griswold v. The Lange Co.*, CCH PROD. LIAB. RPT. ¶ 7634, at 14,685, 14,691 (D. Colo. 1976) ("Since punitive damages are not recoverable under Colorado's wrongful death statute, preclusion of recovery under the survival statute as well would lead to the ironical result that a defendant in Colorado was in a better position with a dead plaintiff than a maimed one").

29. Punitive damages are awarded most frequently in cases of fraud, malicious prosecution, false imprisonment, defamation, trespass, conversion, battery, and assault, nearly all of which require a showing of intentional or reckless conduct as a part of the plaintiff's cause of action. See note 34 *infra*.

30. Some courts distinguish between "actual" or "express" malice and "legal" malice, the former evidencing deliberation and hatred, the latter indicating a wanton or reckless disregard of the rights of another. See generally *H & R Block, Inc. v.*

defendant's conduct reflected a reckless, wanton or oppressive³¹ disregard of the rights³² or interests³³ of the plaintiff.³⁴ The amount of the award is determined by the jury upon consideration of the character of the defendant's misconduct, the nature and extent of the plaintiff's injury, and the wealth of the defendant.³⁵ Punitive

Testerman, 275 Md. 36, 338 A.2d 48 (1975). Either type of malice generally will support a punitive damages award in a tort action, *see* 275 Md. at —, 338 A.2d at 52, but some courts stress the need to establish the moral culpability of the defendant's motive. *See* Walker v. Sheldon, 10 N.Y.2d 401, 404, 179 N.E.2d 497, 498, 223 N.Y.S.2d 488, 490 (1961) ("Punitive or exemplary damages have been allowed in cases where the wrong complained of is morally culpable, or is actuated by evil or reprehensible motives . . ."). In many jurisdictions malice can be inferred from acts of gross negligence that evidence a wanton disregard for the rights of others. *See, e.g.,* Adams v. Whitfield, 290 S.2d 49, 51 (Fla. 1974). But some courts require that "actual" malice be established. *See, e.g.,* G.D. Searle & Co. v. Superior Ct., 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975).

31. The difference between "reckless" and "wanton" conduct is, in most cases, inconsequential, and the terms are frequently used interchangeably. *See* W. HALB, HANDBOOK ON THE LAW OF DAMAGES 210 n.37 (1896).

For a sampling of the various verbal standards used by courts in claims for punitive damages, *see* Boehm v. Fox, 473 F.2d 445, 447 (10th Cir. 1973) ("Wantonness is characterized by a realization of the imminence of damage to others and a restraint from doing what is necessary to prevent the damage because of indifference as to whether it occurs"); Richardson v. Employers Liab. Assurance Corp., 25 Cal. App. 3d 232, 246, 102 Cal. Rptr. 547, 556 (1972) ("'Oppression' . . . means subjecting a person to cruel and unjust hardship in conscious disregard of his rights"); Reserve Trucking Co. v. Fairchild, 128 Ohio St. 519, 531-32, 191 N.E. 745, 750 (1934) ("'Wanton negligence' . . . implies the failure to exercise any care toward those to whom a duty of care is owing when the probability that harm will result from such failure is great and such probability is actually known to the defendant"). For a thorough examination of verbal standards in the products liability context, *see* G.D. Searle & Co. v. Superior Ct., 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975) and text at notes 495-532 *infra*.

Although some courts consider "gross negligence" sufficient to support a punitive damages award, a majority of jurisdictions require something more. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 10 (4th ed. 1971). Some courts have held that for punitive damages to lie, the defendant's disregard for the rights of others must partake of a criminal character. *See, e.g.,* Northwestern Natl. Cas. Co. v. McNulty, 307 F.2d 432, 442 (5th Cir. 1962).

32. *See, e.g.,* State Farm Gen. Ins. Co. v. Clifton, 86 N.M. 757, 759, 527 P.2d 798, 800 (1974).

33. *See, e.g.,* Sellinger v. Freeway Mobile Home Sales, Inc., 110 Ariz. 573, 577, 521 P.2d 1119, 1123 (1974).

34. *See* RESTATEMENT (SECOND) OF TORTS § 908(2) (Tent. Draft No. 19, 1973). A review of the approximately 370 punitive damages cases digested in the General Digest over the five-year period between 1970 and 1974 indicates that fraud actions account for about one sixth of the total reported decisions. Conversion actions were the second most frequent type of tort case reported, followed by automobile accident cases involving aggravated acts of misconduct. Other types of tort actions that appeared at least five times include, in decreasing order of frequency: malicious prosecution, assault and battery, false arrest and false imprisonment, defamation, interference with contractual relations, civil rights violations, wrongful failure to pay insurance claims, trespass, and nuisance. Some 50 of the total cases during the five-year period involved breaches of contract in which punitive damages were infrequently allowed. *See* text at notes 66-98 *infra*.

35. RESTATEMENT (SECOND) OF TORTS § 908(2) (Tent. Draft No. 19, 1973).

damages may be assessed vicariously against a business enterprise for the aggravated misconduct of an employee,³⁶ although some jurisdictions restrict such awards to cases in which a managing officer of the enterprise ordered, participated in, or consented to the misconduct.³⁷

Despite its acknowledged place in the law,³⁸ the punitive damages doctrine continues to receive substantial criticism.³⁹ Any expansion in its application is therefore certain to meet with vehement objections⁴⁰ emphasizing its many supposed flaws⁴¹ and "anomalous" presence in the law of torts.⁴² It is thus necessary to

36. See W. PROSSER, *supra* note 31, at 12. See also RESTATEMENT (SECOND) OF TORTS § 909 (Tent. Draft No. 19, 1973); Note, *Exemplary Damages Against Corporations*, 30 GEO. L.J. 294 (1942); Note, 70 YALE L.J. 1296, *supra* note 16; text at notes 205-38 *infra*.

37. See, e.g., *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 842 (2d Cir. 1967). The *Restatement (Second) of Torts* § 909 (Tent. Draft No. 19, 1973) adopts this version of the rule. See text at notes 205-38 *infra*.

38. That the doctrine has been widely accepted on its merits is evidenced by its adoption in several recent statutes. See, e.g., Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2520(c) (Supp. 1975); Fair Credit Reporting Act 15 U.S.C. § 1681(n) (1970); NEV. REV. STAT. § 42.010 (1975) (broadly providing for awards of punitive damages in tort cases).

39. See, e.g., Carsey, *The Case Against Punitive Damages: An Annotated Argumentative Outline*, 11 THE FORUM 57 (1975); Duffy, *Punitive Damages: A Doctrine Which Should Be Abolished*, in DEFENSE RESEARCH INSTITUTE: THE CASE AGAINST PUNITIVE DAMAGES 4 (D. Hirsch & J. Pourous eds. 1969); Ford, *The Constitutionality of Punitive Damages*, in *id.* at 15; Ghiardi, *supra* note 22. See also Note, 41 N.Y.U. L. REV. 1158, *supra* note 16.

40. See, e.g., *Walker v. Sheldon*, 10 N.Y.2d 401, 406, 179 N.E.2d 497, 500, 223 N.Y.S.2d 488, 492 (1961) (Van Voorhis, J., dissenting). See also *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967); *Haskell*, *supra* note 9; *Tozer*, *supra* note 9; cf. *DuBois*, *supra* note 9.

41. The following are the most frequently cited purported flaws in the doctrine: (1) Because punitive damages are punitive in nature rather than compensatory, they are "anomalous" and mar the symmetry of the law, see note 42; text at notes 104-09 *infra*; (2) because they are in the nature of a criminal fine, yet are imposed without the usual criminal procedural safeguards, they are unfair to the defendant, and perhaps even unconstitutional, see generally Comment, *supra* note 16; (3) since they are usually considered noncompensatory, they result in an undeserved "windfall" to the plaintiff, see text at note 153 *infra*; (4) the absence of an objective basis to guide the determination of their amount invites abuse and often results in an overly severe sanction on the defendant, see text at notes 277-99 *infra*; (5) it has not been demonstrated that they do in fact deter undesirable conduct, see text at notes 129-51 *infra*. See generally D. DOBBS, *supra* note 16, § 3.9; C. MCCORMICK, *supra* note 16, § 77; Friedman, *supra* note 16, at 399-408. As developed in this article, these problems are either illusory, outweighed by more important considerations, or capable of being minimized through effective control by the trial and appellate courts.

42. See, e.g., *Fay v. Parker*, 53 N.H. 342, 384 (1873); W. PROSSER, *supra* note 31, at 9. While the punitive damages objectives of punishment and deterrence plainly do not predominate in the majority of tort cases, their presence in tort law is hardly "anomalous." As early as the thirteenth century, "in a characteristically English fashion punishment was to be inflicted in the course of civil actions: it took the form of manyfold reparation, of penal and exemplary damages." 2 F. POLLOCK &

scrutinize the doctrinal and functional soundness of extending the punitive damages remedy to the expansive field of products liability litigation.

2. *Compatibility of Punitive Damages Doctrine with Theories of Products Liability*

Few courts or commentators today challenge the appropriateness of including a punitive damages claim in actions brought in negligence⁴³ or fraud and deceit,⁴⁴ even in the area of products liability litigation.⁴⁵ But questions have been raised concerning the propriety of such claims in actions brought in strict tort and implied warranty,⁴⁶ perhaps the principal theories employed today in products liability cases.

a. *Strict liability in tort.* At least two commentators have suggested that the punitive damages doctrine is logically inconsistent with the strict tort theory of liability.⁴⁷ "Strict liability and punitive damages," it is asserted, "will not mix. In strict liability the character of the defendant's act is of no consequence; in the punitive damages claim the character of the act is paramount."⁴⁸ The argument is that a punitive damages claim based upon allegations of aggravated fault is logically incompatible with a strict products liability action in which the manufacturer's care, or absence thereof, is not relevant to the

F. MAITLAND, *supra* note 17, at 522 (footnote omitted). See note 18 *supra*. Moreover, rules of proximate causation and certainty of proof of damages are often modified in a plaintiff's favor in cases of aggravated misconduct. See RESTATEMENT (SECOND) OF TORTS § 501(2) (1965); Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U. PA. L. REV. 586 (1933). There now appears to be a long overdue resurgence of interest in according punishment and deterrence a respected place in tort theory. See Kelly, *The Inner Nature of the Tort Action*, 2 IR. JUR. 279 (N.S. 1967); Veitch & Miers, *Assault on the Law of Tort*, 38 MOD. L. REV. 139 (1975). Cf. Calabresi, *Optimal Deterrence and Accidents*, 84 YALE L.J. 656 (1975).

43. See, e.g., *Koppinger v. Cullen-Schlitz & Associates*, 513 F.2d 901 (8th Cir. 1975) (negligence and *res ipsa loquitur*); *Lueck v. Southern Pac. Transp. Co.*, 111 Ariz. 560, 535 P.2d 599 (1975) (en banc) (negligence *per se*).

44. See, e.g., *Walker v. Sheldon*, 10 N.Y.2d 401, 179 N.E.2d 497, 223 N.Y.S.2d 488 (1961).

45. See, e.g., *Standard Oil Co. v. Gunn*, 234 Ala. 598, 176 S. 332 (1937) (fraud and deceit); *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967) (counts of fraud and deceit, breach of express and implied warranties, negligence, negligence *per se*, and strict tort); *Ostopowitz v. William S. Merrell Co.*, N.Y.L.J., Jan. 11, 1967, at 21, cols. 3-4 (Sup. Ct. Westchester County, N.Y.).

46. See, e.g., *Haskell*, *supra* note 9, at 618-20; *Tozer*, *supra* note 9; Note, *supra* note 9, at 626-27.

47. See *Haskell*, *supra* note 9, at 618-20; *Tozer*, *supra* note 9. Cf. *Hoffman v. Sterling Drug, Inc.*, 374 F. Supp. 850, 856 n.4 (M.D. Pa. 1974).

48. *Tozer*, *supra* note 9, at 301.

determination of liability for compensatory damages.⁴⁹ This argument is based upon the apparent shift of attention in strict tort from the manufacturer and its fault to the product and its "defectiveness."⁵⁰

The incompatibility argument has some superficial appeal, but for several reasons does not withstand analysis. First, its primary contention that liability in strict tort precludes consideration of a defendant manufacturer's fault is highly dubious. In fact, rather than dispensing with the notion of fault from products liability law, strict tort theory expands it by extending the legal consequences of fault to the "innocent" manufacture of defective products⁵¹ in a manner analogous to negligence per se.⁵² Yet even acknowledging that strict tort eliminates the requirement of proving a manufacturer's fault, this is so only with respect to establishing liability for compensatory damages. As a liability doctrine designed to compensate product accident victims for their actual losses, strict tort theory has never purported to delimit the remedies that might be appropriate if a plaintiff's accident is attributable to some aggravated fault of the manufacturer.

Second, the incompatibility argument rests upon the invalid assumption that punitive damages claims must be established by facts identical to those supporting the underlying claim for compensatory damages. This assumption was repudiated over a century ago in *Fleet v. Hollenkemp*,⁵³ the earliest reported products liability case involving punitive damages. Addressing the question of whether punitive damages could be awarded in an action brought in case as well as in trespass, the court responded: "[W]hether exemplary

49. See, e.g., *Hawes v. General Motors*, No. 76 CP 2551 (C.P. Hampton County, S.C., filed March 12, 1976), in which the court denied defendant's motion to strike punitive damages claim from strict tort cause of action (unpublished order, June 10, 1976). General Motors argued that since the degree of care exercised by the manufacturer is irrelevant under strict tort liability theory, "the punitive damages concept is incompatible with the policy goals underlying strict tort liability." *Hawes v. General Motors*, No. 76 CP 2551, at 6.

50. See generally Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965); Weinstein, Twerski, Piehler & Donaher, *Product Liability: An Interaction of Law and Technology*, 12 DUQUESNE L. REV. 425, 429 (1974).

51. Cf. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959).

52. See, e.g., Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 835 (1972). Professor Wade argues that "[t]he time will probably come when courts are ready to declare that one who supplies a product which is unduly unsafe is negligent per se. Selling a product which is not duly safe is negligence within itself, and no more needs to be proved. Whether this is called negligence or strict liability is not really significant." *Id.* at 850.

53. 52 Ky. 219 (1852). See note 333 *infra*.

damages should or should not be given does not depend upon the form of action so much as upon the extent and nature of the injury done and the manner in which it was inflicted, whether by negligence, wantonness [*sic*], or with or without malice."⁵⁴ In another early punitive damages case in which the defendant raised the trespass-case distinction, the court remarked that "[s]uch [a] distinction would be as arbitrary and unjust, as it is technical."⁵⁵ Punitive damages claims have long been deemed compatible with the negligence cause of action despite the fact that considerably more, and sometimes different, proof is required to establish that a defendant's conduct was "willful and wanton" or "malicious" rather than merely negligent.⁵⁶ The first modern products liability case to address the incompatibility argument in the context of an action brought in strict tort, *Drake v. Wham-O Manufacturing Co.*,⁵⁷ similarly concluded as follows: "Where the principal claim is based on strict liability in tort and there is an additional claim of wanton disregard of the plaintiff's rights, it is a simple matter to allow the plaintiff to make a supplementary showing of aggravating conduct for the purpose of proving entitlement to punitive damages."⁵⁸ The *Drake* court reasoned that this was an appropriate approach since "a claim for punitive damages is considered a prayer for a specific type of relief in Wisconsin, not a part of the claim itself"⁵⁹

Moreover, punitive damages awards have been held appropriate in a number of cases involving various other causes of action based on strict principles of liability, including nuisance,⁶⁰ trespass to land and liability for ultra-hazardous activities,⁶¹ negligence per se,⁶²

54. 52 Ky. at 225-26.

55. *Merrills v. Tariff Mfg. Co.*, 10 Conn. 384, 388 (1835).

56. See note 31 *supra*. But cf. *LoRocco v. New Jersey Mfrs. Indem. Ins. Co.*, 82 N.J. Super. 323, 197 A.2d 591 (Super. Ct. App. Div. 1964).

57. 373 F. Supp. 608 (E.D. Wis. 1974).

58. 373 F. Supp. at 611. Accord, *Hawes v. General Motors*, No. 76 CP 2551 (C.P. Hampton County, S.C., filed March 12, 1976) (unpublished order denying defendant's motion to strike punitive damages claim from strict tort liability cause of action, June 10, 1976).

59. 373 F. Supp. at 611. See *Hawes v. General Motors*, No. 76 CP 2551 (C.P. Hampton County, S.C., filed March 12, 1976) (unpublished order denying defendant's motion to strike punitive damages claim from strict tort liability cause of action, June 10, 1976).

60. See, e.g., *Nevada Cement Co. v. Lemler*, 89 Nev. 447, 514 P.2d 1180 (1973).

61. See, e.g., *Milford v. Tidwell*, 276 Ala. 110, 159 S.2d 621 (1963). Cf. *Berg v. Reaction Motors Div.*, 37 N.J. 396, 181 A.2d 487 (1962); *Atlas Chem. Indus., Inc. v. Anderson*, 514 S.W.2d 309 (Tex. Civ. App. 1974), *affd.*, 524 S.W.2d 681 (Tex. 1975).

62. See, e.g., *Lueck v. Southern Pac. Transp. Co.*, 111 Ariz. 560, 535 P.2d 599 (1975); *Garner v. Maxwell*, 50 Tenn. App. 157, 360 S.W.2d 64 (1961).

defamation,⁶³ and implied warranty in the sale of drugs.⁶⁴ In light of this established use of punitive damages in strict liability cases generally, and because there is no sound reason for not allowing a plaintiff seeking punitive damages to show a greater culpability for that purpose than he must for his underlying theory of compensatory liability, the incompatibility argument should be rejected.⁶⁵

b. *Warranty.* Sometimes a plaintiff injured by a defective product is able to bring his action only in warranty because other claims are blocked by a shorter tort statute of limitations or other procedural bar. Such a plaintiff faces a substantial doctrinal obstruction to the recovery of punitive damages no matter how serious the manufacturer's misconduct and despite the likelihood that punitive damages would be appropriate were the action framed in negligence or strict tort. The obstacle is the rule, mechanically recited by courts and commentators over the years, that punitive damages may not be awarded in contract actions.⁶⁶ Since warranty actions have generally been thought to sound in contract rather than tort,⁶⁷ the assumption that punitive damages will not lie in a products liability action brought in warranty has not been questioned.⁶⁸

The rule that punitive damages may not be recovered in contract actions does have several closely circumscribed exceptions. Thus,

63. See, e.g., *Reynolds v. Pegler*, 123 F. Supp. 36 (S.D.N.Y. 1954), *affd.*, 223 F.2d 429 (2d Cir.), *cert. denied*, 350 U.S. 846 (1955); *Rogers v. Florence Printing Co.*, 233 S.C. 567, 106 S.E.2d 258 (1958).

64. See *Fleet v. Hollenkemp*, 52 Ky. 219 (1852).

65. In addition to strict tort, there are, of course, other "strict" theories of products liability in which fault need not be established by the plaintiff to recover compensatory damages. See RESTATEMENT (SECOND) OF TORTS § 402B; UNIFORM COMMERCIAL CODE §§ 2-313 to -315; 1 R. ANDERSON, UNIFORM COMMERCIAL CODE §§ 2-313:16, 2-314:71, 2-315:9 (2d ed. 1970). The reasoning in the textual discussion above should apply equally well to these theories of liability. Thus, the strict nature of these theories should be no obstacle to the inclusion of punitive damages claims in such cases. However, the UCC presents its own unique problems. See text at notes 87-98 *infra*.

66. See RESTATEMENT OF CONTRACTS § 342 (1932). See generally 5 A. CORBIN, CONTRACTS § 1077 (1964); 10 HALSBURY, THE LAWS OF ENGLAND, Damages § 566, at 207 (1909); Simpson, *Punitive Damages for Breach of Contract*, 20 OHIO ST. L.J. 284 (1959); Note, *The Expanding Availability of Punitive Damages in Contract Actions*, 8 IND. L. REV. 668 (1975); Note, *Exemplary Damages in Contract Cases*, 7 WILLAMETTE L.J. 137 (1971). The rule was so clearly established and incontrovertible in 1930 that it was not discussed at all when presented to the American Law Institute for consideration. See 8 ALI PROCEEDINGS 340 (1929-1930).

67. See, e.g., *Kreb-Stengel Co. v. Gora*, 70 York Legal Record 207 (C.P. York County, Pa., April 11, 1957); Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1127 (1960).

68. See Note, *supra* note 9, at 627; *Hawes v. General Motors*, No. 76 CP 2551 (C.P. Hampton County, S.C., unpublished order, June 10, 1976) (implied warranty of merchantability); *Hibschman Pontiac, Inc. v. Batchelor*, — Ind. App. —, —, 340 N.E.2d 377, 380-82 (1976) (express warranty); Nolan, *supra* note 9, at 6:20.

punitive damages may be awarded upon proof of the requisite wantonness of behavior in the following types of cases: fraud; breach of promise of marriage; breach of contract of service by a public utility or common carrier; wrongful failure by a bank to honor a depositor's check; breach of contract of employment; breach of fiduciary duty; interference with contractual relations of others; and breach of contract amounting to or accompanied by an independent tort.⁶⁹ Each purported exception, however, is ultimately reconcilable with the underlying rule that precludes the recovery of punitive damages for breach of contract, since each involves conduct apart from the breach itself that may amount to an independent tort for which punitive damages could be awarded anyway.⁷⁰ Moreover, several of the exceptions may be explained as merely a relaxation of the stricter damages rules of contract law in situations in which actual damages are particularly difficult to ascertain.⁷¹ Deviations from the rigid application of the rule are occasionally reported,⁷² but close analysis shows that the deviations are illusory and that the rule remains as firmly entrenched as ever in the law.⁷³

69. See generally 5 A. CORBIN, *supra* note 66, § 1077; L. SIMPSON, LAW OF CONTRACTS 394 (2d ed. 1965); RESTATEMENT OF CONTRACTS § 342 (1932). One commentator has suggested that the various exceptions may be generally explained in terms of situations involving oppressive abuse of power by the defendant. D. DOBBS, *supra* note 16, § 3.9, at 207. Professor Dobbs points to the cases that have approved punitive damages awards against insurers for failing to pay on insurance policies, utilities for terminating services, employers for discharging employees in breach of contract, and other defendants such as banks, telegraph companies and public carriers who have similarly committed "some serious abuse of a position of privilege or power, even without guilty state of mind." *Id.* at 206. The product manufacturer has analogous monopolistic control over the means of gathering information concerning product hazards, the means of evaluating such hazards, and often the means of reducing or eliminating these hazards. One may plausibly conclude from these cases that a product manufacturer that flagrantly abuses its position in a manner that results in injury or death to a consumer has committed a breach "not only of the contract, but also of a duty imposed by law," *id.* at 207, and should therefore be subject to liability in a contractual warranty action for punitive damages.

70. Cf. RESTATEMENT OF CONTRACTS § 342, comment c at 562 (1932). See generally 5 A. CORBIN, *supra* note 66, § 1077.

71. See RESTATEMENT OF CONTRACTS § 342, comments a & b (1933). See generally 5 A. CORBIN, *supra* note 66, § 1077.

72. See, e.g., D. RICE, CONSUMER TRANSACTIONS 190 (1975) ("A few cases, notably in Ohio, hold that exemplary damages may be recovered in an action for breach of an express warranty on the ground that formalism in characterization, pleading and proof ought not to govern . . ."); R. NORDSTROM, SALES § 155, at 475 (1970) ("[T]here are some cases . . . in which there is a sufficient sense of indignation and outrage connected with the default so that penal damages will be allowed by some states").

73. Both of the cases cited by Professor Rice, see note 72 *supra*, *Craig v. Spitzer Motors of Columbus, Inc.*, 109 Ohio App. 376, 160 N.E.2d 537 (1959), and *Saberton v. Greenwald*, 146 Ohio St. 414, 66 N.E.2d 224 (1946), included claims of fraudulent conduct that might have formed the basis for independent actions sounding in tort.

Yet routine application of the rule in cases falling outside the established exceptions is difficult to justify when punitive damages otherwise appear appropriate. Attention has been given to approaching the problem from a functional perspective when punitive damages are sought in the areas in which tort and contract law overlap,⁷⁴ such as warranty law in products liability litigation.⁷⁵

Although largely absorbed into the law of contracts at a fairly early date, warranty law was born in tort⁷⁶ and has always retained much of its original tort character.⁷⁷ In recent years there has been a lively contest between tort and contract for jurisdiction over warranty principles in the products liability field.⁷⁸ While it appears that at least in cases against manufacturers for personal injuries the law of torts will ultimately triumph,⁷⁹ strict enterprise liability for defec-

Similarly, the two cases cited by Professor Nordstrom, *supra* note 72, at 476 n.91, *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967), and *Grandi v. LeSage*, 74 N.M. 799, 399 P.2d 285 (1965), also involved claims of fraudulent conduct in addition to the allegations of breach of warranty. But a possibly permanent deviation with potentially far-reaching implications has appeared in the general contract-law rule in one or two states. See *Dold v. Outrigger Hotel*, 54 Hawaii 18, 501 P.2d 368 (1972); *Goo v. Continental Cas. Co.*, 52 Hawaii 235, 473 P.2d 563 (1970). See also *State Farm Gen. Ins. Co. v. Clifton*, 86 N.M. 757, 759, 527 P.2d 798, 800-01 (1974); *Bank of New Mexico v. Rice*, 78 N.M. 170, 180, 429 P.2d 368, 378 (1967).

74. For example, one commentator has stated:

The classification of wrongs into torts and breaches of contract often leads, as in the case of other legal classifications, to an erroneous belief in exactitude and certainty. . . . Many cases can be classified in either field; the classification adopted will be found to vary with the purpose for which it is adopted. . . . A greater flexibility of remedy exists in cases within the zone of overlapping because the court is free to choose a rule customarily applied in either field, in accordance with the particular combination of facts before it.

5 A. CORBIN, *supra* note 66, § 1077, at 440; see M. COHEN & F. COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 197 (1951); Simpson, *supra* note 66, at 288.

75. See generally W. PROSSER, *supra* note 31, at 634-36; Kessler, *supra* note 1; Wade, *Is Section 402A of the Second Restatement of Torts Preempted by the UCC and Therefore Unconstitutional?*, 42 TENN. L. REV. 123 (1974).

76. The origins of warranty have been traced to deceit on the case and, to a lesser extent, to trespass on the case. See C. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW 330-40 (1949). See generally Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 8 (1888); Prosser, *supra* note 67, at 1126; Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713, 728-34 (1970).

77. See W. PROSSER, *supra* note 31, at 634-35. See also Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 118-22 (1943).

78. Compare *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965), with *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). Compare *Dickerson*, *Was Prosser's Folly Also Traynor's? or Should the Judge's Monument Be Moved to a Firmer Site?*, 2 HOFSTRA L. REV. 469 (1974), with Wade, *supra* note 75.

79. See *Center Chem. Co. v. Parzini*, 234 Ga. 868, 218 S.E.2d 580 (1975); *Victorson v. Bock Laundry Mach. Co.*, 37 N.Y.2d 395, 399, 355 N.E.2d 275, 278, 373

tive products can be broadly understood as a synthesis of both tort law and the contract law of sales.⁸⁰ The strict warranty of product quality sprang from this union. It is clearly retrogressive to burden this hybrid theory, which only recently broadened the range of manufacturer responsibility,⁸¹ with a restrictive contract-law rule of damages designed long ago under different conditions and for different purposes.

The rule prohibiting punitive damages for breach of contract perhaps can be explained by the perpetual search for certainty and predictability in commercial transactions.⁸² By limiting the promisor's liability for breach to the promisee's foreseeable loss, the law permits the promisor to predict his liability with some certainty and to weigh this cost against the benefits of employing his resources elsewhere. The rule may be appropriate in the context of a commercial transaction involving a mutual exchange of promises and obligations in which only economic loss is likely to result from a breach of obligation.⁸³

The modern strict warranty of product quality, on the other hand, is a response to radical changes in the nature of sales transac-

N.Y.S.2d 39, 43 (1975). See also *Kirkland v. General Motors Corp.*, 521 P.2d 1353 (Okla. 1974); *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 305 A.2d 412 (1973); Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 849 (1973). See generally Epstein, *Medical Malpractice: The Case for Contract*, 1976 AM. B. FOUND. RESEARCH J. 87, 94.

80. See *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Markle v. Mulholland Inc.*, 265 Ore. 259, 263-68, 509 P.2d 529, 531-33 (1973); Kessler, *supra* note 1, at 898. Fearful that some of the more restrictive aspects of warranty law might be incorporated into a combined theory of strict products liability, some courts have scrupulously attempted to maintain the doctrinal purity of strict tort and warranty. See, e.g., *Romano v. Westinghouse Elec. Co.*, — R.I. —, 336 A.2d 555 (1975). Other courts have attempted to blend the concepts into a hybrid doctrine of strict products liability. See, e.g., *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973); *Kirkland v. General Motors Corp.*, 521 P.2d 1353 (Okla. 1974). Observing that the warranty action "already seems to be fading into the action for strict liability, with the warranty terminology and legal complications being elided," Professor Wade predicts that "[a]s time goes on and we have more experience with the more recently developed theories, they will surely begin to merge together into a single tort action." Wade, *supra* note 79, at 850. Indeed, one contracts-law scholar has suggested that contract law generally is being absorbed into the law of torts. See G. GILMORE, *THE DEATH OF CONTRACTS* (1974). For a valiant if futile attempt of another contracts-law scholar to forestall the inevitable, see Hill, *Breach of Contract as a Tort*, 74 COLUM. L. REV. 40 (1974), and Hill, *Damages for Innocent Misrepresentation*, 73 COLUM. L. REV. 679 (1973).

81. See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); Kessler, *supra* note 1.

82. See 5 A. CORBIN, *supra* note 66, § 1077, at 440; Simpson, *supra* note 66, at 284.

83. See 5 A. CORBIN, *supra* note 66, § 1077, at 438. This hypothesis, however, has never been thoroughly demonstrated.

tions that have left the modern consumer with little ability either to bargain effectively to protect his financial interests or to examine products effectively to protect himself from physical injury.⁸⁴ Since tort law to a much greater extent than contract law has developed to protect the individual's interest in personal safety,⁸⁵ "many decisions . . . have held, regardless of the form of the action, that the tort aspects of warranty call for the application of a tort rather than a contract rule in various respects, such as . . . the more liberal tort rule as to damages"⁸⁶ This is especially true in warranty cases in the field of products liability where the protection of manufacturers' ability to predict their potential liability accurately is a less compelling goal than the tort law's objective of deterring culpable accident-producing behavior. It thus seems reasonable to conclude that the tort law doctrine of punitive damages should be available to injured plaintiffs in common-law products liability litigation whether the action is nominally brought in "tort" or in "warranty."

The problem of whether punitive damages can be recovered in warranty cases, however, is not resolved quite so easily. Warranty claims in products liability cases are today controlled largely by the Uniform Commercial Code which provides for warranties of quality in sections 2-313, 2-314 and 2-315. A serious question concerning the availability of punitive damages in actions lying within the purview of the Code is raised by section 1-106(1), which states that "[t]he remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law." Official Comment 1 states that one purpose of this section is "to make it clear that compensatory damages are limited to compensation. They do not include consequential or special damages, or penal damages" The question is, simply stated, whether section 1-106(1) precludes awards of punitive damages in warranty actions brought to enforce rights or obligations created by the Code.⁸⁷

84. See *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 467, 150 P.2d 436, 443 (1944) (Traynor, J., concurring); *Henningson v. Bloomfield Motors, Inc.*, 32 N.J. 358, 390, 161 A.2d 69, 87 (1960).

85. See generally Wade, *supra* note 75.

86. W. PROSSER, *supra* note 31, at 635.

87. Put another way, the question is whether the remedies provided for breach of warranty in sections 2-714 and 2-715 are exclusive. Cf. Note, *Punitive Damages for Wrongful Dishonor of a Check*, 28 WASH. & LEE L. REV. 357, 360 (1971). For a pre-Code case allowing punitive damages for breach of warranty under the Uniform Sales Act, see *Craig v. Spitzer Motors*, 160 N.E.2d 537 (Ct. App. Ohio 1959).

The answer is far from clear and deserves a more thorough examination than can be given here. The few courts that have considered the effect of section 1-106(1) on punitive damages claims have differed in their approach. Courts in two cases⁸⁸ involving claims of fraud held that the section precludes recovery of punitive damages, one of them emphasizing that no other rule of law "specifically" providing for punitive damages in such a case had been brought to its attention.⁸⁹ Courts in two other cases,⁹⁰ similarly involving claims of fraud, held that punitive damages may be recovered in rescission actions brought under the Code "where the breach is accompanied by fraudulent acts which are wanton, malicious and intentional."⁹¹ Finally, one court indicated that a punitive damages award in an action brought under section 4-402 for wrongful dishonor of a check would not be inconsistent with section 1-106(1).⁹²

Since article two of the Code has no specific provision for punitive damages,⁹³ the language of section 1-106(1) and official comment 1 thereto limits punitive damages claims for breach of warranty to situations in which such claims are "specifically" provided for "by other rule of law." One commentator has suggested that the "other rule of law" exception permits courts to continue awarding punitive damages in cases in which "the failure to perform a promise (such as a warranty of quality) is combined with tortious conduct (such as wanton failure to determine whether the goods measured up to their warranted quality)."⁹⁴ Other commentators have suggested that the courts "will have to find or make up the 'other rule of law,' by extrapolation from the fraud cases."⁹⁵ In view of warranty's tort background and its special role in products liability litigation, a liberal extrapolation from the common law appears desirable in personal injury cases brought under the Code despite the admonition

88. *Bryan Constr. Co. v. Thad Ryan Cadillac, Inc.*, 300 S.2d 444, 448 (Miss. 1974); *Waters v. Trenckmann*, 503 P.2d 1187 (Wyo. 1972).

89. 503 P.2d at 1191.

90. *Grandi v. LeSage*, 78 N.M. 799, 399 P.2d 285 (1965); *Z.D. Howard Co. v. Cartwright*, 537 P.2d 345 (Okla. 1975). In *Grandi*, the court made no mention of section 1-106(1).

91. 537 P.2d at 348. *Accord*, *Grandi v. LeSage*, 74 N.M. 799, 810, 399 P.2d 285, 293.

92. *See* *Siegman v. Equitable Trust Co.*, 267 Md. 309, 315 n.3, 297 A.2d 758, 761 n.3 (1972) (dictum). *See also* Note, *supra* note 87.

93. *See* R. NORDSTROM, *supra* note 72, at 475. Punitive damages are not provided for elsewhere in the Code. *See* Note, *supra* note 87, at 369.

94. R. NORDSTROM, *supra* note 72, at 475-76.

95. J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 133 (1972).

that "the other rule of law" must "specifically" provide for punitive damages.⁹⁶ The marketing of a defective product in wanton disregard of its danger to consumers might then be broadly classified as "tortious conduct"—sufficiently tortious, at least, to serve as the "other rule of law"—and thus provide a rationale for punitive damages awards in products liability actions brought solely for breach of warranty under the Code.⁹⁷ This novel interpretation, however, is not free of internal weaknesses, and it stretches section 1-106(1) further than its drafters probably intended.⁹⁸ Yet perhaps the product manufacturer guilty of an outrageous disregard for public safety should have no standing to complain of a creative method of dealing with the serious problem of product safety.

B. *The Functions of Punitive Damages and Their Applicability to Products Liability Litigation*

Punitive damages serve a variety of functions for both the individual plaintiff and society.⁹⁹ The primary purposes of the doctrine are usually said to be the punishment of the defendant¹⁰⁰ and the deterrence of similar wrongdoing in the future.¹⁰¹ The doctrine has been criticized as an intrusion into a domain more properly served by the criminal law,¹⁰² which shares these goals.¹⁰³ The

96. Cf. UNIFORM COMMERCIAL CODE §§ 2-318, 2-719(3) (acknowledging the need for expansion of the standard commercial law principles in cases involving personal injuries).

97. Cf. R. NORDSTROM, *supra* note 72, at 475-76.

98. The essential problem is how "restrictive" or "liberal" an interpretation should be placed upon section 1-106(1) when personal injuries are involved in the products liability context. Compare Dickerson, *supra* note 78, with Note, *supra* note 87.

99. See generally Lambert, *supra* note 16, at 167-75; Rice, *supra* note 16, at 309-12; Note, *Punitive Damages Under Federal Statutes: A Functional Analysis*, 60 CALIF. L. REV. 191 (1972); Note, 70 HARV. L. REV. 517, *supra* note 16, at 520-24.

100. See, e.g., Campbell Estates, Inc. v. Bates, 21 Ariz. App. 162, 517 P.2d 515 (1973); Schmidt v. Central Hardware Co., 516 S.W.2d 556 (Mo. Ct. App. 1974); A. WATSON, A TREATISE ON THE LAW OF DAMAGES FOR PERSONAL INJURIES § 714, at 846 (1901). See text at notes 113-28 *infra*.

101. See, e.g., Jolley v. Puregro Co., 94 Idaho 702, 708-09, 496 P.2d 939, 945-46 (1972). See text at notes 129-51 *infra*. While deterrence is achieved largely through the threat of punishment and is itself a principal purpose of punishment, it is analytically helpful to use the term "punishment" in a narrower sense and consider separately the purposes of punishment and deterrence. See, e.g., RESTATEMENT (SECOND) OF TORTS § 908 (Tent. Draft No. 19, 1973).

102. See, e.g., P. JAMES, GENERAL PRINCIPLES OF THE LAW OF TORTS 13-15, 402 (3d ed. 1969). But see, e.g., Veitch, Book Review, 22 N. IR. L.Q. 560, 563 (1971).

103. "We concede that smart money allowed by a jury, and a fine imposed at the suit of the people, depend on the same principle. Both are penal, and intended to deter others from the commission of the like crime." Cook v. Ellis, 6 Hill 466,

injection of these objectives into the civil law of damages, it is said, destroys the majestic "symmetry" of the law.¹⁰⁴ This argument, first articulated in the nineteenth century,¹⁰⁵ fails to recognize the strong historical and functional nexus between tort and crime¹⁰⁶ and additionally betrays a passion for a geometrically balanced legal structure that is undeserving of serious consideration.¹⁰⁷ No doubt certain problems are generated by the straddling of the civil and criminal law,¹⁰⁸ but the strength received by the punitive damages doctrine from both fields enhances its value as a particularly flexible tool in the overall administration of justice.¹⁰⁹

In addition to punishment and deterrence, two less prominent functions are served by punitive damages awards. First, they induce private persons to enforce the rules of law by rewarding them for bringing malefactors to justice.¹¹⁰ Second, such awards further compensate plaintiffs whose actual damages exceed those for which the law allows recovery and whose recovery in any event has likely been substantially depleted by attorneys' fees.¹¹¹ These four functions have been assigned varying emphasis in different jurisdictions over

467, 41 Am. Dec. 757, 757-58 (N.Y. 1844). See Demogue, *Validity of the Theory of Compensatory Damages*, 27 YALE L.J. 585, 592 (1918) (referring to acts subject to punitive damages assessments as "quasi crimes").

104. See *Fay v. Parker*, 53 N.H. 342, 382 (1873); note 22 *supra*.

105. See *Fay v. Parker*, 53 N.H. 342, 382 (1873).

106. See T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 369 (5th ed. 1956); 2 F. POLLOCK & F. MAITLAND, *supra* note 17, at 448, 449, 511-43; 1 T. STREET, *THE FOUNDATIONS OF LEGAL LIABILITY* 477-78 (1906); Veitch, *supra* note 102, at 563.

107. Cf. Keeton, *Is There a Place for Negligence in Modern Tort Law?*, 53 VA. L. REV. 886, 897-98 (1967); Montgomery & Owen, *supra* note 2, at 838-39.

108. See note 41 *supra*. See generally Note, 41 N.Y.U. L. REV. 1158, *supra* note 16; Comment, *supra* note 16.

109. See Demogue, *supra* note 103, at 592-93: "The idea of punishment finds its completest expression in the criminal law, and it might seem that in an ideal system of jurisprudence the ideas of punishment and compensation would respectively be limited exclusively to the fields of criminal and civil wrong. But the common law has never been guilty of the folly of putting theory entirely before practical ends, and hence we find that the idea of punishment still holds its ground in the administration of civil justice." See also *Davis v. Schuchat*, 510 F.2d 731, 738 (D.C. Cir. 1975) ("Punitive damages are allowed because the civil law has long recognized that in certain situations deterrence can better be achieved through modification of the civil awards than through a requirement of criminal sanctions"); 1 T. STREET, *supra* note 106, at 478; Veitch & Miers, *supra* note 42, at 139. Cf. Cappelletti, *Governmental and Private Advocates for the Public Interest in Civil Litigation: A Comparative Study*, 73 MICH. L. REV. 793, 800, 881 (1975). But cf. Hall, *Interrelations of Criminal Law and Torts: II*, 43 COLUM. L. REV. 967, 978 (1943) (the blending of civil and criminal functions tends to "confuse established distinctions").

110. See text at notes 152-84 *infra*.

111. See text at notes 185-203 *infra*.

time;¹¹² each merits careful consideration, especially as it pertains to the products liability context.

1. Punishment

The punishment of a defendant who has intentionally or recklessly injured the plaintiff advances several important goals. First, it helps restore the plaintiff's emotional equilibrium. When the judicial system punishes a defendant, the injured plaintiff receives the satisfaction of seeing the defendant suffer.¹¹³ It might be difficult to rationalize private revenge as the sole justification for punishment in a modern legal system,¹¹⁴ but at least so long as punishment achieves some other substantial objective it seems perfectly appropriate to allow a person injured by the wanton misconduct of another to vent his outrage by extracting a judicial fine.¹¹⁵

112. Although the objectives underlying the punitive damages doctrine are divided in this article into four separate functions, it should be noted that the four functions may conceptually be reduced to the two broad goals of punishment and compensation. See note 152 *infra*.

113. The retributive nature of punitive damages is mentioned in some cases. See *King v. Towns*, 120 Ga. App. 895, 902-03, 118 S.E.2d 121, 128 (1960); *Great Atl. & Pac. Tea Co. v. Smith*, 281 Ky. 583, 600, 136 S.W.2d 759, 768 (1940); *Winkler v. Hartford Accident & Indem. Co.*, 66 N.J. Super. 22, 29, 168 A.2d 418, 422 (Super. Ct. App. Div. 1961); *Hansley v. Jamesville & W.R.R.*, 117 N.C. 565, 571, 23 S.E. 443, 445 (1895) (Clark, J., concurring).

In ancient law, damages were often statutorily prescribed to make the penalty proportionate to the degree of vengeance deemed appropriate for the particular offense. See 1 G. DRIVER & G. MILES, *supra* note 17, at 500; H. MAINE, *ANCIENT LAW* 365-66 (3d Am. ed. 1888); D. PUGSLEY, *THE ROMAN LAW OF PROPERTY AND OBLIGATIONS* 32 (1972); note 193 *infra*. Classical retributive theory in fact requires that punishment in some fashion "match" the crime. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 231, 233-34 (1968); see G. HEGAL, *PHILOSOPHY OF RIGHT* pt. 1, §§ 97-104 (1842); I. KANT, *THE PHILOSOPHY OF LAW* pt. 2, § 29, E (W. Hastie transl. 1887). English law has reportedly avoided any such compulsion to maintain a parity between crime and punishment. See A. GOODHART, *ENGLISH LAW AND THE MORAL LAW* 92 (1953). But cf. W. MIDDENDORFF, *THE EFFECTIVENESS OF PUNISHMENT* 52 (1968).

114. Some commentators view revenge as patently inappropriate to a "civilized" legal system. See, e.g., G. CALABRESI, *THE COSTS OF ACCIDENTS* 298-99 (1970); James, *Analysis of the Origin and Development of the Negligence Action*, in *THE ORIGIN AND DEVELOPMENT OF THE NEGLIGENCE ACTION* 35, 37 (U.S. Dept. of Transp. 1970); K. MENNINGER, *THE HUMAN MIND* 448 (1945), quoted in Ehrenzweig, *A Psychoanalysis of Negligence*, 47 NW. U. L. REV. 855, 865-66 (1953) ("[T]he scheme of punishment is a barbaric system of revenge, by which society tries to 'get even' with the criminal"); Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774, 793 (1967); Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827, 833 (1927).

115. Most modern forms of retributive theory adopt this partial justification rationale. See H.L.A. HART, *supra* note 113, at 235-37. Jeremy Bentham urges plaintiffs to relish the punishment of defendants from whom a damages award has been extracted:

Every kind of satisfaction, as it is a punishment to the offender, naturally produces a pleasure of vengeance to the injured party.

That pleasure is a gain; it calls to mind Samson's riddle—it is the sweet com-

Second, punishment serves as a form of revenge for the public at large. At an elemental level, society can use judicial punishment to maintain the public peace by channeling individual retaliation into the courtroom.¹¹⁶ But punishment may also restore the emotional equilibrium of society as a whole. A person who intentionally or wantonly injures another generally violates not only some explicit tort or criminal law rule of conduct¹¹⁷ but also a basic norm of social behavior.¹¹⁸ The failure to punish violations of societal rules weakens the legal and moral fabric of society.¹¹⁹ The imposition of punishment by a court expresses society's disapproval of serious misconduct¹²⁰ and accordingly reaffirms its commitment to maintaining

ing out of the terrible, it is honey dropping from the lion's mouth. Produced without expense, a clear gain resulting from an operation necessary on other accounts, it is an enjoyment to be cultivated, like any other; for the pleasure of vengeance, abstractly considered, is, like every other pleasure, a good in itself.

J. BENTHAM, *THEORY OF LEGISLATION* 309 (1831). See generally L. FULLER, *ANATOMY OF THE LAW* 27-30 (1968); O. HOLMES, *supra* note 3, at 40-41; W. MIDDENDORFF, *supra* note 113, at 51-53; L. RADZINOWICZ, *IDEOLOGY AND CRIME* 115 (1966); 2 J. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 81-83 (1883).

116. See O. HOLMES, *supra* note 3, at 41-42 ("If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution"). This function of punitive damages is mentioned with some frequency in early cases. See, e.g., *Alcorn v. Mitchell*, 63 Ill. 553 (1872); *Merest v. Harvey*, 128 Eng. Rep. 761 (C.P. 1814) (separate opinion of Heath, J.) (punitive damages serve to prevent duelling). See *RESTATEMENT (SECOND) OF TORTS* § 901(d) (Tent. Draft No. 19, 1973). Indeed this is said to have originally been the primary function of tort law generally. See *RESTATEMENT (SECOND) OF TORTS* § 901, comment *a* at 56 (Tent. Draft No. 19, 1973). Professor Robert Keeton has suggested that, even when only compensatory damages are at stake, negligence law still "appeases" the plaintiff who may receive some real satisfaction in knowing that society, through the law, approves of his feelings against the defendant, and that this declaration alone may be sufficient to allay violent retaliations in some instances. R. KEETON, *VENTURING TO DO JUSTICE* 152 (1969). See also Franklin, *supra* note 114, at 810 n.131.

In the area of criminal law, this idea has been most recently recognized by the Supreme Court in *Gregg v. Georgia*, 44 U.S.L.W. 5230, 5239 (U.S. July 2, 1976) ("In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs").

117. See generally 2 J. STEPHEN, *supra* note 115, at 75-81.

118. See Rice, *supra* note 16, at 311. See generally C. FRIED, *AN ANATOMY OF VALUES* 183-200 (1970); H.L.A. HART, *supra* note 113, at 137-39; A. LINDEN, *CANADIAN NEGLIGENCE LAW* 486-89 (1972); Keeton, *supra* note 107, at 888.

119. "Justice has always been portrayed as a goddess with scales in her hand. A crime makes one of the scales sink, and punishment is designed to restore the balance." W. MIDDENDORFF, *supra* note 113, at 51. The correction of the imbalance caused by a crime was extremely important in certain cultures. See E. HOEBEL, *THE LAW OF PRIMITIVE MAN* 239 (1961) (on the Ashanti of Africa); D. BODDE & C. MORRIS, *LAW IN IMPERIAL CHINA* 182 (1967), excerpted in Funk, *Interstitial Jurisprudence Illustrated in Teaching Criminal Law*, 27 J. LEGAL ED. 53, 64 n.49 (1975) (describing the view in Manchu China). See generally C. FRIED, *supra* note 118, at 121-26; 2 J. STEPHEN, *supra* note 115, at ch. 17.

120. See C. FRIED, *supra* note 118, at 125-26; H.L.A. HART, *supra* note 113, at

its moral and legal standards.¹²¹

Finally, punishment serves two objectives tangential to the notion of retribution. By punishing the law-breaker, society indirectly rewards the law-abider. If law-breakers go unpunished, law-abiders consequently must pay a disproportionate share in a system that purports to require reciprocal sacrifices from each citizen. The punishment of offenders thus reinforces the confidence of the law-abider in the basic fairness of the legal system and in the utility of his personal decision to obey the law.¹²² Additionally, punishment serves as a reformatory device to educate the offender to society's legal values and to allow him to atone for his misdeed through suffering.¹²³

One may inquire whether these general objectives of retribution and reformation can be served in cases involving serious marketing misbehavior by manufacturers. Certainly the outrage incited in the public and the injured victim by a defective product differs in both manner and degree from that provoked by a spit in the face.¹²⁴ But

235; 2 J. STEPHEN, *supra* note 115, at 81; Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 405 (1958). See generally Feinberg, *The Expressive Function of Punishment*, 49 THE MONIST 397 (1965).

121. Professor Goodhart summarizes this viewpoint well: "[W]ithout a sense of retribution we may lose our sense of wrong. Retribution in punishment is an expression of the community's disapproval of crime, and if this retribution is not given recognition then the disapproval may also disappear. A community which is too ready to forgive the wrongdoer may end by condoning the crime." A. GOODHART, *ENGLISH LAW AND THE MORAL LAW* 93 (1953).

122. C. FRIED, *supra* note 118, at 121-26 (1970). See H.L.A. HART, *THE CONCEPT OF LAW* 193 (1961). An additional rationale for retribution is that it shifts attention

from the criminal to the honest man. It may seem inhumane and brutal to inflict a deliberate hurt on the guilty man simply because he has hurt another. But what of the law-abiding man? Is our compassion for the criminal to leave the honest citizen with no comparative advantage? Is he to gain nothing by being willing to accept the restraints of law? . . . So, . . . it may be said that it is necessary to maintain a proper balance of advantage between the criminal and the honest man, whether this is done by conferring a reward for law observance or by imposing a penalty for violation of the law.

L. FULLER, *supra* note 115, at 29. See also 10 HALSBURY, *supra* note 66, at 306. Cf. Fleming, *The Role of Negligence in Modern Tort Law*, 53 VA. L. REV. 815, 823 (1967).

123. See, e.g., H.L.A. HART, *supra* note 113, at 24-27 (1968); W. MIDDENDORFF, *supra* note 113, at 68; H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 53-58 (1968). The theory that punishment provides a means for the wrongdoer to atone for his offense rings of early Christian dogma. See Williams, *The Aims of the Law of Tort*, 4 CURRENT LEGAL PROB. 137, 143 (1951) ("[T]he early Court of Chancery . . . [theorized] that the conscience of the wrongdoer must be purged by making restitution, which was exacted for the benefit of the wrongdoer's soul rather than of the victim's pocket"); 2 F. POLLOCK & F. MAITLAND, *supra* note 17, at 452. However, current support exists for the view that punishment in fact achieves certain psychological benefits for both the individual and society. See C. FRIED, *supra* note 118, at 126; L. FULLER, *supra* note 115, at 27-28. See generally Veitch & Miers, *supra* note 42, at 150-51.

124. A spit in the plaintiff's face was the basis for a punitive damages recovery in *Alcorn v. Mitchell*, 63 Ill. 553 (1872). See note 189 *infra*.

this does not mean that there is no place in products liability cases for public or private vengeance.

Because of the elusive nature of the misconduct of a manufacturer who markets a defective product and because of the remoteness of the misdeed from the product injury, such offenses if discovered at all are apt to appear as mere errors in judgment hardly deserving of punishment or condemnation.¹²⁵ Yet the retributive needs of the aggrieved individual and of society may be substantial in cases in which a manufacturer has marketed a defective product knowingly or in reckless disregard of a serious risk of injury to consumers. An award of punitive damages in such cases should help assuage the victim's feelings of helplessness and frustration over the apparent futility of holding an anonymous corporation accountable for its damaging misdeeds.¹²⁶ Further, such awards would express the public's condemnation of the misconduct and remind manufacturers of their responsibilities for consumer safety.¹²⁷ Finally, the punishment of manufacturers guilty of intentional or reckless breaches of their safety obligations should tend to diminish whatever unfair competitive advantages such companies might otherwise have.¹²⁸

2. Deterrence

In its retributive role, punishment satisfies the individual's and society's need for vengeance, and thus serves to rectify some of the

125. Cf. *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 844-51 (2d Cir. 1967).

126. See generally Heilbroner, *Controlling the Corporation*, in *IN THE NAME OF PROFIT* 191, 200 (R. Heilbroner ed. 1973) (A "feeling of individual impotence in the face of massive organizations" is in part "[w]hat fuels the public protest against corporate misbehavior. . . . It is an aspect of a widely shared frustration with respect to all bastions of power that are immense, anonymous and impregnable, and yet inextricably bound up with the industrial society that few of us wish to abandon"); A. LINDEN, *supra* note 118, at 487.

127. Thus, punishment may be of particular importance in the context of business offenses to serve "the symbolic function of reinforcing the public sense that there are certain acts that are fundamentally wrong, that must not be done." L. FULLER, *supra* note 115, at 28. Although the applicability of the reformatory role of punishment to "white-collar" offenses has been questioned, see Rice, *supra* note 16, at 312, punishment may have a particularly useful role in this area. The line between legal and illegal conduct of a business enterprise is often hazy and, partially as a result of this phenomenon, even serious misconduct frequently goes unpunished. See Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116, 120-21 (1968); Steele, *Fraud, Dispute, and the Consumer: Responding to Consumer Complaints*, 123 U. PA. L. REV. 1107, 1108-09 (1975). See generally *IN THE NAME OF PROFIT*, *supra* note 126.

128. See notes 148-51 *infra* and accompanying text, indicating the beneficial deterrent effect that punitive damages achieve in eliminating the profitability of the misconduct.

negative effects of prior misconduct. But perhaps the predominant purpose of most punishment, including punitive damages, is the deterrence of similar misconduct in the future.¹²⁹ While the practical effectiveness of punishment in deterring misbehavior is a source of constant study and debate,¹³⁰ most commentators agree that punishment does achieve a measure of deterrence in many cases.¹³¹ The degree of its effectiveness depends upon several recognized factors. First, the potential wrongdoer must know that the particular conduct he is contemplating is both proscribed and punishable.¹³² Second, he must be able to alter his conduct to avoid punishment.¹³³ Finally, he must have the desire to alter his conduct to avoid punishment.¹³⁴ Each of these factors must be considered in the products liability context to determine whether punitive damages can deter the marketing of defective products.

The first factor raises the question of whether a general standard creating liability for marketing misbehavior in "reckless" or "flagrant" disregard of the public safety will give manufacturers a sufficiently clear statement of the proscribed conduct to achieve a significant deterrent effect.¹³⁵ The terms may well be vague, but

129. See, e.g., *Fletcher v. Western Natl. Life Ins. Co.*, 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970); *Jolley v. Puregro Co.*, 94 Idaho 702, 708-09, 496 P.2d 939, 945-46 (1972); *Walker v. Sheldon*, 10 N.Y.2d 401, 179 N.E.2d 497, 223 N.Y.S. 2d 488 (1961); L. FULLER, *supra* note 115, at 34-35. See generally W. PROSSER, *supra* note 31, at 9; RESTATEMENT (SECOND) OF TORTS § 908(1) (Tent. Draft No. 19, 1973). Deterrence has been characterized as a "utilitarian" goal of punishment. See H.L.A. HART, *supra* note 113, at 128-29. See generally A. GOODHART, *supra* note 121, at 93-94; F. ZIMRING & G. HAWKINS, DETERRENCE 18-25 (1973).

130. See, e.g., W. MIDDENDORFF, *supra* note 113, at 49, 53-67. So too is the morality of general deterrence. See, e.g., Andenaes, *The Morality of Deterrence*, 37 U. CHI. L. REV. 649 (1970) (defending its morality).

The actor's moral inhibitions and fear of censure are additional motivations for complying with the law. See Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 961 (1966), reprinted in J. ANDENAE, PUNISHMENT AND DETERRENCE 34, 49-50 (1974). Yet corporate decision-makers often need the threat of punishment as well to outweigh the drive for profit maximization. *But cf. id.* at 959-60.

131. See, e.g., L. FULLER, *supra* note 115, at 34-35 (1968).

132. See generally F. ZIMRING & G. HAWKINS, *supra* note 129, at 142-49 (1973); Andenaes, 114 U. PA. L. REV. 949, *supra* note 130, at 963.

133. See, e.g., P. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW 564-54 (1970); J. SALMOND, LAW OF TORTS 12-13 (6th ed. 1924) in R. HEUSTON, SALMOND ON THE LAW OF TORTS 20-21 (16th ed. 1973).

134. See text at notes 148-51 *infra*.

135. It must be conceded that any definition of the punishable conduct, such as marketing a product in "reckless," "wanton," or "flagrant" disregard of the public safety will necessarily be quite vague. Therefore a real risk exists that manufacturers will avoid some lawful activity in their attempt to avoid the proscribed conduct. See generally P. ATIYAH, *supra* note 133, at 554; G. CALABRESI, THE COSTS OF ACCIDENTS 121-25 (student ed. 1970). However, the gap between "negligent" and "reckless"

once several punitive damages verdicts have been levied and a rule of responsibility has emerged, most manufacturers will likely be informed in fairly short order of at least the general purport of the standard and the consequences of its breach. Moreover, most manufacturers should have an intuitive sense of the general type of gross misconduct proscribed by the rule despite the difficulty of determining in advance whether any particular conduct is in flagrant disregard of the public safety.

The second factor concerns the manufacturer's ability to make the product safer. Since the recovery of punitive damages requires a showing of flagrant misconduct,¹³⁶ a punitive damages judgment would necessarily reflect the factfinder's conclusion that the manufacturer had the capability to prevent the accident.¹³⁷ A manufacturer is usually not even liable for actual damages caused by an unavoidable defect in its products¹³⁸ and so a fortiori would not be liable for punitive damages in such cases. As a general rule, however, a manufacturer is able to market a safer product if it so desires.¹³⁹

behavior is probably wide enough to protect the manufacturer who acts in good faith. Cf. MODEL PENAL CODE § 53 (Tent. Draft No. 9, 1959). Since many of the manufacturers who are aware of the vagueness of the proscription will recognize and rely upon the protection of good faith conduct, the chilling effect of the standard's vagueness should not be too great.

Concededly, however, if punitive damages do have the deterrent effect they are supposed to have, some products that are in fact "safe enough" under the vague standard of "defectiveness" will be made even safer by manufacturers anxious to avoid being adjudged "reckless" at some future date, and other similar products will not be marketed at all. This economic sacrifice, however, should be considerably more than offset by the decrease in excessive injuries prevented by the threat of punitive damages awards.

136. See notes 29-31 *supra* and accompanying text.

137. In some circumstances even criminal sanctions are imposed for reckless misconduct, and sometimes for negligent and even innocent behavior. See note 175 *infra* and accompanying text. The presumption is that even inadvertent conduct can be controlled and thus deterred:

Knowledge that conviction and sentence, not to speak of punishment, may follow conduct that inadvertently creates improper risk supplies men with an additional motive to take care before acting, to use their faculties and draw on their experience in gauging the potentialities of contemplated conduct. To some extent, at least, this motive may promote awareness and thus be effective as a measure of control. Certainly legislators act on this assumption in a host of situations and it seems to us dogmatic to assert that they are wholly wrong.

MODEL PENAL CODE § 2.02, Comment 3, at 126-27 (Tent. Draft No. 4, 1955). See also MODEL PENAL CODE § 201.4, comment 2, at 52-53 (Tent. Draft No. 9, 1959); H.L.A. HART, *supra* note 113, at 132-40. But see Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632 (1963).

138. See RESTATEMENT (SECOND) OF TORTS § 402A, comment k (1965). But cf. James, *The Untoward Effects of Cigarettes and Drugs: Some Reflections on Enterprise Liability*, 54 CALIF. L. REV. 1550, 1558 (1966). See generally Montgomery & Owen, *supra* note 2, at 813-14, 827-28.

139. See 2 F. HARPER & F. JAMES, *LAW OF TORTS* 756-57, 1205-06 (1956); Tunc, *Fault: A Common Name for Different Misdeeds*, 49 TUL. L. REV. 279, 294 (1975).

The final factor bearing on whether punitive damages will have a deterrent effect on marketing misconduct requires a determination of the extent to which manufacturers threatened with punishment will want to avoid the proscribed conduct. The intensity of such a desire in any particular case will depend upon the manufacturer's perception of the likelihood of his being identified and punished¹⁴⁰ as well as on the likely severity of punishment.¹⁴¹ The availability of punitive damages in products liability cases should make it far more likely that offending manufacturers will be exposed and punished since the remedy supplies an additional financial incentive to both the victim and his attorney to uncover and prove the proscribed behavior.¹⁴² Most manufacturers thus would soon realize that the availability of punitive damages to injured consumers has reduced their ability to avoid punishment for the reckless marketing of defective products.

But as in the case of compensatory damages, a manufacturer will have virtually no idea how large the aggregate of punitive damages penalties may be¹⁴³ because it will rarely be possible to predict accurately the number or extent of injuries likely to be caused by marketing a product in a particular condition. Furthermore, the method of measurement used for punitive damages introduces additional imponderables¹⁴⁴ that make it virtually impossible for a manufacturer to forecast accurately its total liability for punitive damages. Thus, depending on such factors as the gravity of wrongdoing, the number and seriousness of the resulting injuries, and the financial status of the manufacturer, the punitive damages assessments that might flow from wantonly marketing a defective product could range from nothing to millions, or even hundreds of millions, of dollars.¹⁴⁵ Such a manufacturer will probably have a good idea of the potential profitability of marketing the defective product but no idea of its potential liability. It may well be, then, that in cases of this type, no form of potential liability will be likely to influence its behavior appreciably.¹⁴⁶ Nevertheless, in most cases a manufacturer well-

140. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 77-78 (1972); Andenaes, 114 U. PA. L. REV. 949, *supra* note 130, at 949, 963; Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1124-27 (1972); Ross, *Law, Science, and Accidents: The British Road Safety Act of 1967*, 2 J. LEGAL STUDIES 1, 67 (1973).

141. See, e.g., Andenaes, 114 U. PA. L. REV. 949, *supra* note 130, at 970; Ehrlich, *The Deterrent Effect of Criminal Law Enforcement*, 1 J. LEGAL STUDIES 259 (1972).

142. See text at notes 185-203 *infra*.

143. See generally DuBois, *supra* note 9.

144. See notes 277-99 *infra*.

145. See note 278 *infra* and accompanying text.

146. The management of the manufacturing enterprise, for example, may be un-

advised by counsel and acting rationally should be influenced to some extent in its decision-making by the possibility of the largely open-ended liability of a punitive damages verdict.¹⁴⁷

Punitive damages, therefore, should have the greatest deterrent effect in cases in which the marketing of an excessively hazardous product is profitable for the manufacturer even after the payment of claims for actual damages.¹⁴⁸ The greater the product's profit potential and the less the likelihood that individual victims will seek recovery, the greater the need for a strong deterrent to reckless marketing decisions.¹⁴⁹ Illustrative is the case of a manufacturer who

aware of the potential for liability. See note 135 *supra*. It may even be unaware of the misconduct. See *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 842, 843-44 (2d Cir. 1967). But see *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 711-12, 60 Cal. Rptr. 398, 414-15 (1967).

147. One, of course, may question the hypothesis that all activity within the enterprise is rationally directed toward the maximization of profits. See P. ATIYAH, *supra* note 133, at 597; J. GALBRAITH, *THE NEW INDUSTRIAL STATE* (1967); C. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* (1975). But cf. ATIYAH, *supra* note 133, at 583. Some juries, however, apparently do assume that a large punitive damages verdict will effectively deter misconduct perceived as particularly dangerous and reprehensible. Thus, a jury in one of the MER/29 cases, *Ostopowitz v. William S. Merrell Co.*, N.Y.L.J. Jan. 11, 1967, at 21, col. 3 (Super. Ct. N.Y. 1967), assessed \$850,000 punitive damages against the defendant because, in the words of one juror, "the company 'had to be punished not only for what they had done, but also as a warning to all drug companies, that they could not do things like this.'" Washington Post, Dec. 12, 1966, at 12, col. 1." Rheingold, *supra* note 127, at 134 n.46.

148. Punitive damages are widely considered to be useful in preventing wrongdoing from being profitable for the malefactor. See, e.g., *Cox v. Stolworthy*, 94 Idaho 683, 691, 496 P.2d 682, 690 (1972) ("Clearly in such cases the award of punitive damages should aim at making the cost of such repetitive anti-social conduct uneconomical"); *Walker v. Sheldon*, 10 N.Y.2d 401, 406, 179 N.E.2d 497, 499, 223 N.Y.S.2d 488, 492 (1961) ("In the calculation of his expected profits, the wrongdoer is likely to allow for a certain amount of money which will have to be returned to those victims who object too vigorously and he will be perfectly content to bear the additional cost of litigation as the price for continuing his illicit business. It stands to reason that the chances of deterring him are materially increased by subjecting him to the payment of punitive damages"); *Funk v. Kerbaugh*, 222 Pa. 18, 19, 70 A. 953, 954 (1908) (punitive damages allowed where defendant conducted blasting operations in a manner likely to shatter plaintiff's buildings "because it was cheaper to pay damages . . . then to do the work the usual way"). See *Morris*, 44 HARV. L. REV. 1173, *supra* note 16, at 1185-88 ("While 'compensatory' damages provide a financial smart for a defendant who has not gained anything by his wrong, they may merely result in the payment of a bargain sale price for an advantage when the defendant has acted to further his own interests." *Id.* at 1185); *Stoll*, *supra* note 17, at 20 ("The sense of justice which demands extraction of a calculated profit is based not only upon the concept of deterrence, but equally upon an appraisal of the very deed itself, regardless of whether repetition is likely or not. Justice demands in every instance that violation of the law shall not pay"). Cf. *Barth v. B.F. Goodrich Tire Co.*, 265 Cal. App. 2d 228, 240-41, 71 Cal. Rptr. 306, 313 (1968) (products liability case). Even England retained an exception for this type of case in its judicial restriction of the punitive damages doctrine. See note 23 *supra*.

149. A case in point was the marketing of MER/29 by Richardson-Merrell in the early 1960s. For a discussion of this case, see text at notes 336-51 *infra* and Rheingold, *supra* note 127.

knowingly markets a product particularly apt to cause minor injuries of a type that will be uneconomical for injured consumers to litigate. The availability of punitive damages in such cases would make litigation economically feasible for such persons, and the manufacturer's potential liability would accordingly be increased substantially. Since the deterrent effect of a penalty is generally thought to vary directly with its size,¹⁵⁰ punitive damages should be particularly effective in these cases.¹⁵¹

3. Law Enforcement

Closely tied to the other goals of punitive damages, especially deterrence, is a distinct objective which may be termed law enforcement.¹⁵² Detractors of the punitive damages doctrine, minimizing its role in punishing wrongdoers and deterring misconduct, frequently criticize the doctrine for allowing the plaintiff a "windfall" in addition to any compensation for losses he may actually have sustained.¹⁵³ But this criticism of the doctrine invariably overlooks the important fact that this prospective windfall motivates many reluctant plaintiffs to press their claims. And as the litigation of such claims increases, misconduct is increasingly punished and deterred.

The use of punitive damages as a law enforcement tool is socially beneficial in two respects. First, serving as a kind of bounty, the prospect of punitive damages recoveries induces injured plaintiffs to

150. See, e.g., Andenaes, 114 U. PA. L. REV. 949, *supra* note 130, at 970.

151. See generally F. ZIMRING & G. HAWKINS, *supra* note 129, at 194-209. "Increased penalties are probably more or less significant depending on the size of the penalty increase relative to the size of base penalty." *Id.* at 202. Thus, punitive damages should be most effective as a deterrent in cases in which the injuries are relatively minor or infrequent, such as some forms of allergic reactions to drugs, and should be less effective in cases in which the frequency and severity of injuries are expected to be greater. See *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 841 (2d Cir. 1967); Childres, *Remedies*, 1965 AM. SURVEY AM. L. 289, 291 (1966).

152. It will be recalled that four objectives for the imposition of punitive damages have been identified: punishment, deterrence, law enforcement, and compensation. See text at notes 100-12 *supra*. It has also been noted that deterrence is actually a sub-goal of punishment. See note 101 *supra*. Similarly, law enforcement is clearly a sub-goal of deterrence. In so far as law enforcement includes inducing private parties to sue for misdeeds, see text at notes 154-57 *infra*, law enforcement is also a sub-goal of compensation. Thus, as has been noted, the objectives of punitive damages may be reduced to the two broad categories of punishment and compensation. See note 112 *supra*. However, the isolation of law enforcement, as with deterrence, clarifies analysis.

153. See, e.g., *Walker v. Sheldon*, 10 N.Y.2d 401, 409, 179 N.E.2d 497, 501, 223 N.Y.S.2d 488, 494 (1961) (dissenting opinion); *Kink v. Combs*, 28 Wis. 2d 65, 80, 135 N.W.2d 789, 798 (1965). Even some proponents of punitive damages suggest that such damages ought properly to go to the state. *Hodgin & Veitch, supra* note 23, at 132; cf. 13 P. JAMES, *supra* note 102, at 402.

act as "private attorneys general"¹⁵⁴ and thereby helps to increase the number of wrongdoers who are properly "brought to justice."¹⁵⁵ This assistance is important, for many serious misdeeds deserving of punishment are beyond the reach of the criminal law and the public prosecutor.¹⁵⁶ Thus, a shortcoming in the administration of criminal justice is partially remedied, and the "private prosecutor" is rewarded with a "private fine" "for his public service in bringing the wrongdoer to account."¹⁵⁷

Second, punitive damages awards help to implement the various

154. Until recently the private attorney general concept of encouraging public interest litigation through awarding attorneys' fees to successful plaintiffs was enjoying growing acceptance, particularly in the federal courts. See, e.g., *Souza v. Travisono*, 512 F.2d 1137 (1st Cir. 1975). See generally Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U. L. REV. 301 (1973). However, in *Alyeska Pipeline Serv. Co. v. Wilderness Soc.*, 421 U.S. 240 (1975), the Supreme Court severely restricted this development in holding that attorneys' fees may be awarded to a prevailing party only where expressly provided by statute, except "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . .'" 421 U.S. at 258-59. For an application of this exception, see *Doe v. Poelker*, 515 F.2d 541, 546-49 (8th Cir. 1975).

This standard of liability for attorneys' fees is remarkably similar to the showing that must be made for the recovery of punitive damages, and is based on a similar rationale. See *Hall v. Cole*, 412 U.S. 1, 5, 15 (1973). Thus, despite the Court's general disapproval of awarding attorneys' fees in the absence of statutory authorization, the Court has acknowledged their appropriateness where the defendant has displayed a gross disregard for the rights of the plaintiff. Cf. 412 U.S. at 15.

155. See, e.g., *Fay v. Parker*, 53 N.H. 342, 347 (1873); 2 F. POLLOCK & F. MAITLAND, *supra* note 17, at 522; *Morris*, 24 ILL. L. REV. 730, *supra* note 16.

156. See C. McCORMICK, *supra* note 16, at 276; 2 F. POLLOCK & F. MAITLAND, *supra* note 17, at 522; Freifield, *supra* note 24, at 7-8; Tunc, *A Little-Noticed Theory in the Law of Torts: Boris Stark's Theory of Guarantee*, 121 U. PA. L. REV. 618, 621 (1973). With the possible exception of such limited areas as the food and drug industries, legislators and prosecutors have generally avoided any serious attempt to punish manufacturers guilty of acts detrimental to the public safety. Cf. Rice, *supra* note 16, at 312 (noting the "public and prosecutorial abhorrence of 'white-collar' . . . criminal prosecutions . . ."). The National Commission on Product Safety noted the ineffectiveness of existing criminal sanctions in promoting adequate product safety. See NCPS FINAL REPORT, *supra* note 1, at 95. See generally C. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* (1972).

In recent years, the Consumer Product Safety Commission has initiated criminal proceedings against both manufacturers and their executive officers for violations of the various product safety statutes under its jurisdiction. See, e.g., *Current Developments*, 3 PROD. SAF. & LIAB. REP. 814 (Aug. 22, 1975). However, there have been few such prosecutions, in part because of the Commission's "extensive, unexplained and unnecessary delay . . . in developing and forwarding its cases to the prosecutors." In the Matter of a CPSC Recommendation for Criminal Prosecution for Certain Violations of the Federal Hazardous Substances Act and the Poison Prevention Packaging Act, BCMI No. 1862 (concurring opinion of Commissioner Franklin) (Jan. 27, 1976); see *Current Developments*, 4 PROD. SAF. & LIAB. REP. 112 (Feb. 6, 1976). For a compilation of recent prosecutions under the federal product safety statutes, most of which have been brought under the Federal Food, Drug, and Cosmetic Act, see M. BENDER, *FED. CONSUMER PROD. SAFETY SERVICE, CURRENT DEVELOPMENTS* § 601.1[h].

157. *Neal v. Newburger Co.*, 154 Miss. 691, 700, 123 S. 861, 863 (1929).

rules of substantive law.¹⁵⁸ No doubt few, if any, rules of law are obeyed or enforced in all instances.¹⁵⁹ Violations are apt to be especially prevalent, however, when the unlawful activity is profitable for the violator,¹⁶⁰ when violations are difficult to detect¹⁶¹ or to prove,¹⁶² when violations are "morally neutral,"¹⁶³ when the rules are vague,¹⁶⁴ when enforcement of the rules is infrequent,¹⁶⁵ or when pun-

158. Many economists have recognized the advantages of private, "victim" enforcement of the law. See, e.g., Becker & Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUDIES 1, 6 (1974). They suggest that it is a most, and in some cases the only, effective means of enforcing the law of private transactions "precisely because the incentives to the enforcers are as large as the incentives to prospective violators." *Id.* at 13. "The amount of victim enforcement would be optimal if successful enforcers were paid the amount they had suffered in damages, excluding their enforcement costs, divided by the probability that they are successful." *Id.* at 14. See R. POSNER, *supra* note 140, at 360. Posner suggests that punitive damages could be used in appropriate cases to achieve the correct multiple of actual damages for optimal enforcement and deterrence. See *id.* But cf. *id.* at 78. The law will be obeyed, in other words, only if the sanctions for its breach are large enough to make the breach uneconomical. *Id.* at 320.

Some commentators have recently rebelled against the extensive intrusion of economics into the law of torts. They claim that "the law has 'gone a-whoring after False Gods' and that all of the raving about loss absorption has blinded lawyers to the obvious concern of tort law with right and wrong . . . [and] the symbolic function of tort law." Veitch & Miers, *Assault on the Law of Tort*, 38 MODERN L. REV. 139, 142-43 (1975). See Veitch, Book Review, 22 N. IRE. L.Q. 560, 563 (1971) (complaining that tort theorists as a group "have been led by the nose by economists" too long). See also Buchanan, *Good Economics—Bad Law*, 60 VA. L. REV. 483 (1974); Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974); Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's Economic Analysis of Law*, 87 HARV. L. REV. 1655 (1974). Nevertheless, the economists' ideas on private enforcement have some useful implications for damages rules in product liability law. Particularly relevant is the conclusion that "rewards" such as punitive damages efficiently enforce compliance with the rules of law. For even if the Consumer Product Safety Commission accelerates rule promulgation and enforcement in the years ahead, optimal achievement of product safety will probably require that the victims of product accidents be encouraged to enforce common-law, and perhaps even statutory, rules of product safety. See Twerski, Weinstein, Donaher & Piehler, *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 435, 538 & n.104 (1976). The possibility of punitive damages awards in products liability litigation should encourage victims to seek enforcement in particular cases, which in turn should induce manufacturers to comply with the rules of product safety.

159. See, e.g., Becker & Stigler, *supra* note 158, at 2.

160. See generally R. POSNER, *supra* note 140, at 77-78, 357-62.

161. *Id.*

162. See notes 178-80 *infra* and accompanying text.

163. "[T]here is evidence that the lack of enforcement of penal laws designed to regulate behavior in morally neutral fields may rapidly lead to mass infringements. . . . The individual's moral reluctance to break the law is not strong enough to secure obedience when the law comes into conflict with his personal interests." Andenaes, 114 U. PA. L. REV. 949, *supra* note 130, at 961. See also Hamilton, *Corporate Criminal Liability in Texas*, 47 TEXAS L. REV. 60, 69 (1968).

164. See P. ATTYAH, *supra* note 133, at 554.

165. See *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting) ("The bite of the law is in its enforcement"); W. MIDDENDORFF, *supra* note

ishment is light.¹⁶⁶ By financing the detection, proof and punishment of willful and wanton violations of the rules, punitive damages increase the likelihood that wrongdoers will be identified in the first instance and more severely punished thereafter. To the extent that potential wrongdoers perceive this increase in the probability and size of penalties¹⁶⁷ and the commensurate reduction in the profitability of their misconduct, violations should be deterred and enforcement of the rules of substantive law improved.¹⁶⁸

Perhaps the most fundamental substantive rule of products liability law is that products marketed in a condition generating more accident costs than social utility are "defective" and, accordingly, that the manufacturer should pay for whatever costs are occasioned by the defective condition.¹⁶⁹ Since this is a rule of tort rather than

113, at 50; L. RADJINOWICZ, *IDEOLOGY AND CRIME* 122 (1966); F. ZIMRING & G. HAWKINS, *supra* note 129, at 160-63; Posner, *A Theory of Negligence*, J. LEGAL STUDIES, 29, 41 (1972): "Punishment—an exaction that exceeds the costs to society (here, accident costs) imposed by the particular violation being punished—is necessary where the violator is frequently not apprehended, because a rational lawbreaker will discount the gravity of any legal sanction by the probability that it will be imposed."

166. *See generally*, F. ZIMRING & C. HAWKINS, *supra* note 129, at 194-209. Several of these conditions are generally present in products liability cases. *Cf.* Green & Moore, *Winter's Discontent: Market Failure and Consumer Welfare*, 82 YALE L.J. 903, 909-10 (1973).

167. "The decisive factor in creating the deterrent effect is, of course, not the objective risk of detection but the risk as it is calculated by the potential [offender]." Adenaes, 114 U. PA. L. REV. 949, *supra* note 130, at 963. *See* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1124-27 (1972).

168. One detrimental side effect of allowing punitive damages is that their availability will undoubtedly encourage counsel in some cases to pursue unmeritorious claims, and manufacturers will sometimes have to settle such claims in excess of their fair value because of the risk, however remote, of large jury awards. *See* DuBois, *supra* note 9, at 350. This general type of risk, however, inheres in all litigation regardless of the type of damages sought.

169. *See* note 3 *supra*. *See, e.g.*, Dreisonstok v. Volkswagenwerk A.G., 489 F.2d 1066, 1071 (4th Cir. 1974); Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1274 (5th Cir. 1974); Borel v. Fibreboard Paper Prod. Corp., 493 F.2d 1076, 1087 (5th Cir. 1973); Dorsey v. Yoder Co., 331 F. Supp. 753, 759-60 (E.D. Pa. 1971), *affd.*, 474 F.2d 1339 (3d Cir. 1973); Hall v. E.I. DuPont De Nemours & Co., 345 F. Supp. 353, 360 (E.D.N.Y. 1972); Helicoid Gage Div. of Am. Chain & Cable Co. v. Howell, 511 S.W.2d 573, 577 (Tex. Civ. App. 1974); Metal Window Prod. Co. v. Magnusen, 485 S.W.2d 355, 357-60 (Tex. Civ. App. 1972); G. CALABRESI, *supra* note 135; Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 37-39 (1973); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 835-38 (1973); R. KEETON, *VENTURING TO DO JUSTICE* 159 (1969); R. POSNER, *supra* note 140, at 88-92. Some, of course, would argue with this definition of product defectiveness for purposes of determining a manufacturer's liability. *See, e.g.*, Calabresi & Hirschhoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972); Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1113 (1974). But the notion that product manufacturers should internalize the accident costs of defective products is generally accepted. *See* note 177 *infra* and accompany-

criminal law, it is cast in terms of post-accident loss distribution rather than as an absolute prohibition. This does not mean, however, that a manufacturer should be permitted to abuse the rule flagrantly and with impunity by treating the payment of accident costs merely as a "license fee for the conduct of an illegitimate business."¹⁷⁰ Yet absent the punitive damages remedy, many manufacturers may be tempted to maximize profits by marketing products known to be defective and to absorb resulting injury claims as a cost of doing business.¹⁷¹

Such flagrant breaches of the law exposing others to risks of personal injury violate basic principles of fairness and morality.¹⁷² When conduct seriously endangers not merely property but human life, special efforts must be made to enforce the rules strictly.¹⁷³ This nation has criminalized many forms of conduct that pose particular dangers to the public safety,¹⁷⁴ in some cases even

ing text. And few would argue with the proposition that such products are "defective" from a broader, socioeconomic perspective.

170. *United States v. Dotterweich*, 320 U.S. 277, 282-83 (1943), *quoted in* *United States v. Park*, 421 U.S. 658, 669 (1975). Consumers should have more than a naked right to be compensated for injuries caused by defective products. The rules of products liability might be profitably construed as establishing a consumer right in the first instance not to be injured at all by defective products. In the Preamble to the Joint Resolution in 1967 that established the National Commission on Product Safety, Congress declared that "the American Consumer has a right to be protected against unreasonable risk of bodily harm from products purchased on the open market for the use of himself and his family" Pub. L. No. 90-146 (Nov. 20, 1967), *reprinted in* NCPS FINAL REPORT, *supra* note 1, at 124.

171. This tendency on the part of manufacturers led the National Commission on Product Safety to propose that consumers injured by "knowing or willful" violations of safety standards be awarded treble damages and attorneys' fees. *See* Proposed Consumer Product Safety Act § 30, NCPS FINAL REPORT, *supra* note 1, App. at 29 ("Such statutory redress will add powerful private support to public safety programs"). Congress omitted this particular proposal from the Consumer Product Safety Act enacted in 1972. *See* 15 U.S.C. §§ 2051-2081 (Supp. V 1975).

172. *See* Dworkin, *Taking Rights Seriously*, in *IS LAW DEAD?* 168, 170 (E. Ros-tow ed. 1971); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 563-64 (1972). *See generally* C. FRIED, *supra* note 118, at 66-74.

173. *Cf.* P. ATIYAH, *supra* note 133, at 590.

174. *See, e.g.*, Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 135a (Supp. 1975) prohibiting sale of "economic poisons" under certain conditions including inadequate labeling; Flammable Fabrics Act, 15 U.S.C. § 1192 (1970) (prohibiting the manufacture or sale of fabrics failing to meet applicable safety standards); Federal Hazardous Substances Act, 15 U.S.C. § 1263 (1970) (prohibiting the sale of misbranded or banned hazardous substances); Consumer Product Safety Act, 15 U.S.C. § 2068 (Supp. II 1973) (proscribing the manufacture or sale of products violating applicable safety standards); Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 331 (1970) (prohibiting the sale of adulterated or misbranded foods, drugs, devices or cosmetics). There reportedly has been an increase in recent years in the criminalization of particular forms of accident-producing behavior. *See* Calabresi & Hirschhoff, *supra* note 169, at 1074-75.

In addition to federal statutes, there are an "infinite variety" of state statutes criminally proscribing various forms of hazardous conduct. Among the more com-

providing for strict criminal liability without regard to the defendant's state of mind or degree of fault or care.¹⁷⁵ The enormity of the danger to society posed by defective products would thus seem to require as a minimum the development of rules designed to improve compliance with the common-law rules of product safety.

But is there any reason to believe that manufacturers knowingly or recklessly breach the common-law rules of product safety? To the extent that the manufacturer acts as a rational economic entity, it should recognize that the strict pursuit of profit maximization will often dictate that safety be traded for cost reduction substantially beyond the point where a product becomes legally "defective" and the manufacturer becomes obligated to compensate persons injured by the defect. The expectation of future profits is probably strong enough in many cases to allay any moral conjunctions the manufacturer may feel in breaching some vague common-law rule of product safety.

It may be profitable for a manufacturer to choose to market a defective product for at least three reasons. The first two reasons derive from the fact that manufacturers are not generally called upon to pay for all of the injuries caused by their products. First, in many

mon are prohibitions against the sale of impure food, the sale of firearms to minors, the failure to fence railroads, swimming pools, and other hazardous locations, and the failure to guard elevators, machinery, and other dangerous devices. See W. PROSSER, *supra* note 31, § 36.

175. In *United States v. Park*, 421 U.S. 658 (1975), the Supreme Court upheld the conviction of the president of the Acme Markets food store chain for causing the adulteration of food stored in unsanitary warehouses in violation of the Federal Food, Drug and Cosmetic Act. The Court in *Park* reaffirmed its prior construction of the Act in *United States v. Dotterweich*, 320 U.S. 277 (1943), which had held that the Act "dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." 320 U.S. at 281. It should be noted that section 113 of the Consumer Food Act of 1976, S. 641, passed by the Senate on March 18, 1976, and now pending action by a House Committee, effectively overrules the holding in *Park* by amending the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 333(a), to provide that negligence at a minimum must be established for a criminal conviction under the Act. Still, the following observations made by the Court in *Park* have significance for the awarding of punitive damages in products liability cases:

Thus *Dotterweich* and the cases which have followed reveal that in providing sanctions which reach and touch the individuals who execute the corporate mission . . . the Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur. The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.

421 U.S. at 672.

cases, the product's "defectiveness" is invisible to the injured consumer who frequently is unaware that his injury may be attributable to a violation of law by the manufacturer and who thus may never discover, much less assert, his legal right to compensation.¹⁷⁶ This is especially true when the defect is an inadequate design or warning. Manufacturers are thereby relieved of the burden of paying for a large proportion of the accident costs that the rules of liability presume they will shoulder.¹⁷⁷

Second, even if an injury victim is conscious of his legal rights, the assertion of those rights is expensive, largely because of costly attorneys' fees.¹⁷⁸ The total costs of preparation and litigation tend to be especially high in product cases because of the technical and complex nature of the issues and the resulting difficulties of discovery and proof. Expert witnesses, such as chemists, metallurgists, and toxicologists, are frequently indispensable for establishing liability, and their fees for consulting, testing, and testifying add substantially to the total cost of litigation.¹⁷⁹ Even in cases in which liability

176. Whitford, *Products Liability*, in NATIONAL COMMISSION ON PRODUCT SAFETY, 3 SUPPLEMENTAL STUDIES—PRODUCT SAFETY LAW & ADMINISTRATION: FEDERAL, STATE, LOCAL AND COMMON LAW 221, 223 (1970) [hereinafter NCPS SUPPLEMENTAL STUDIES]. See NCPS FINAL REPORT, *supra* note 1, at 74 ("Small wonder that some manufacturers do not even respond to letters claiming compensation for injuries; they know that more than two-thirds will never pursue the claim"); Rheingold, *supra* note 127, at 141. But see BUREAU OF DOMESTIC COMMERCE, U.S. DEPT. OF COMMERCE, PRODUCT LIABILITY INSURANCE—ASSESSMENT OF RELATED PROBLEMS AND ISSUES 7, 14, 53, 57, 89 (1976) [hereinafter DOC, PROD. LIAB. INS. STUDY] (finding an "increasing consumer awareness of 'legal rights' regarding product liability claims" evidenced in part by growing number of lawsuits).

177. See note 169 *supra* and accompanying text. A fundamental principle of enterprise liability theory is the notion that manufacturers should pay for the costs reasonably associated with the manufacture and sale of their products, including the costs of accidents caused by any defects the products contain. If a manufacturer were not to pay for the injuries caused by its defective product, the product would fail to "pay its way" within the economy and would in a sense consume more resources than it generated. Professor James perhaps has summarized it best: "The optimal allocation of resources in a free enterprise system requires each enterprise to pay its own costs." James, *supra* note 138, at 1550, 1551 n.6 (1966). See P. ATIYAH, *supra* note 133, at 565-600; G. CALABRESI, *supra* note 135, at 68-94 (theorizing that the general deterrence of market forces helps to optimize safety decisions and thus minimizes total accident costs); R. KEETON, *supra* note 169, at 159; Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Ross, Book Review, 84 HARV. L. REV. 1322 (1971). See generally 2 F. HARPER & F. JAMES, *supra* note 139, at 1375-76, 1385; J. O'CONNELL, ENDING INSULT TO INJURY—NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES 76-77, 85 n.26 (1975); Ehrenzweig, *Assurance Oblige—A Comparative Study*, 15 LAW & CONTEMP. PROB. 445 (1950); James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948); Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554, 595 (1961).

178. See Black, *The Mobilization of Law*, 2 J. LEGAL STUDIES 125, 139 (1973).

179. See NCPS SUPPLEMENTAL STUDIES, *supra* note 176, at 229 ("Costs, including both filing and witness fees may sometime be a substantial deterrent to initiating

is fairly clear, the vagaries of the litigation process insure that some valid claims will go completely or partially unpaid.¹⁸⁰ An alert manufacturer, insensitive to moral arguments for obeying the law, may recognize and take advantage of these practical shortcomings in the legal system.

Third, manufacturers may choose to market products known to be defective because safety measures often cause a decrease in profit margins and sales.¹⁸¹ The addition of safety devices to a product will usually increase both the cost to the manufacturer and the price to the consumers;¹⁸² sales may then decline because of the higher price. Sales may also decline because safety measures reduce the product's practical utility or its psychological appeal. Thus, while the cost of affixing adequate warnings to a product is usually minimal, sales may be lost not only because of higher prices but also because consumers are frightened away by the warning.¹⁸³ Similarly, in some cases the

litigation. In a significant percentage of the cases in this survey, the costs exceeded \$1,000, and the plaintiff is usually expected to absorb these costs if the litigation is unsuccessful").

In regard to the unreported case of *Scott v. Outboard Marine Corp.*, No. 71-1661-Civ-JLK (S.D. Fla., filed Oct. 28, 1971) *see* notes 484-92 *infra* and accompanying text, the plaintiff's principal attorney makes the following report concerning the expenses of preparation and trial of the case:

Our out of pocket expenses for such things as depositions, transcripts, photographs and experts ran to approximately \$50,000.00. We took over one hundred and ten depositions; had twenty-two motions to produce and eleven sets of interrogatories. The case took thirty days to try; I had anywhere from three to five lawyers assisting me and the defense had two local attorneys, plus house counsel for OMC, plus their corporate representative, who was also an attorney, so they had four attorneys on their side. I have been told that their defense bills approached \$100,000.00.

Letter from Jon E. Krupnick to David G. Owen, August 7, 1975, on file at *Michigan Law Review*. Mr. Krupnick reports that he and his associates devoted more than 3000 hours in preparation and trial. *Id.* He concludes that it is virtually "impossible for a sole practitioner to effectively handle a major products liability case and, needless to say, without serious injury or death, the economics make it impossible for major products liability cases to be tried." *Id.* *See also* Lloyd, *supra* note 9, at 1. *See generally* Weinstein, Twerski, Piehler & Donaher, *supra* note 50.

180. *Cf.* Keeton, *supra* note 169, at 30. And it is probable that in some substantial proportion of products liability actions, the defendant manufacturers "employ a variety of litigative tactics to discourage meritorious claims." Green & Nader, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man*, 82 *YALE L.J.* 871, 885 (1973).

181. Indeed, this is an important step in the optimal reduction of accident costs within the Calabresian system of general or market deterrence. *See* note 177 *supra*.

182. *See* Morris, *supra* note 177, at 585.

183. *See* Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 87 (4th Cir. 1962) ("had the warning been in a form calculated . . . to convey a conception of the true nature of the danger, this mother . . . might not have purchased the product at all"). *See also* Larsen v. General Motors Corp., 391 F.2d 495, 505-06 (8th Cir. 1968). The remarks of the President of Fairchild Hiller Corporation in a letter to the National Transportation Safety Board reflect this concern: "I must emphasize here the potentially disastrous consequences to an aircraft manufacturer of a statement by the safety board reaching a fatigue failure conclusion—the public image of the plane model

cost of redesigning a product to eliminate defects may be inconsequential as compared with the impact on profits from lost sales caused by the consumer's failure to appreciate the need for the safer design¹⁸⁴ and his frustration with its inconveniences. Faced with situations such as these, manufacturers may rationally choose to increase sales by marketing the product in its defective condition and simply to absorb ensuing injury claims.

Regardless of what actually motivates a manufacturer to market a product known to be defective, such conduct amounts to a conscious flaunting of the law. If public confidence in the legal system is to be maintained, remedies must be developed that will punish and deter flagrant breaches of the rules of behavior. This is particularly so when violations expose consumers to unreasonable risks of personal injury and are motivated solely by the manufacturer's desire for increased profits. The doctrine of punitive damages well serves this purpose in the products liability context. If manufacturers are punished for such conduct by punitive damages assessments, compliance with the safety rules should be increased as profits are reduced. As manufacturers market safer products to avoid increased penalties, managerial determinations of optimal product safety should begin more nearly to approximate that determination embodied in the common-law rules of products liability.

4. Compensation

Although it is frequently said that the purpose of punitive damages is to punish the defendant and deter misbehavior, not to compensate the plaintiff,¹⁸⁵ punitive damages do indeed play an

is severely damaged, future sales of the aircraft are hurt, . . . and our relationships with existing operators are sorely tried." Plaintiff's Memorandum in Opposition to Motion for Partial Summary Judgment at 8, *Engbreth v. Fairchild Hiller Corp.*, Civil No. A-9-71 (D. Alas., filed Jan. 18, 1971); see text at notes 424-31 *infra*. See generally, Twerski, Weinstein, Donaher & Piehler, *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495, 501-05 (1976).

184. See NCPS FINAL REPORT, *supra* note 1, at 69. It is probably quite infrequent that the ordinary consumer will be aware of, much less appreciate, the importance of the safety aspects of a particular design. Moreover, "[c]onsumers generally have no way of knowing how much more they would have to pay to obtain a comparable product as serviceable and less hazardous. Even when aware of a risk in a product, consumers cannot predict the frequency, severity, or probability of injury." *Id.*

185. See, e.g., *Grefe v. Ross*, — Iowa —, 231 N.W.2d 863 (1975); *Prince v. Peterson*, — Utah —, 538 P.2d 1325 (1975). It is for this reason, and on the assumption that the plaintiff has already received full recompense for his injury by an award of compensatory damages, that many courts say that there is no "right" to punitive damages, RESTATEMENT (SECOND) OF TORTS § 908, comment *d* at 81

important—even if usually residual—compensatory role.¹⁸⁶ Such awards to some extent reimburse the plaintiff for losses not ordinarily recoverable as compensatory damages, such as actual losses the plaintiff is unable to prove or for which the rules of damages do not provide relief, including the expenses of bringing suit.

Many punitive damages cases in the eighteenth and nineteenth centuries involved “ungentlemanly” behavior of the defendant that was particularly humiliating to the plaintiff.¹⁸⁷ Since damage to emotional stability was at that time generally *damnum absque injuria*,¹⁸⁸ punitive damages awards assuaged a plaintiff’s loss of honor resulting from a seduced daughter or a spit in the face.¹⁸⁹ Even today the law for various reasons does not fully protect emotional tranquillity through compensatory damages; requiring defendants guilty of flagrant misconduct to make full compensation for such injuries helps to fill this void.¹⁹⁰ When one person is injured by the malicious actions of another, “the human spirit is bruised by the knowledge of another’s ill-will or contempt”¹⁹¹ The legal revenge provided by punitive damages helps restore the plaintiff’s emotional equilibrium¹⁹² and in this way compensates him for the psychological harm caused by the defendant’s malicious act.¹⁹³

(Tent. Draft No. 13, 1973), and that such damages are a windfall. See, e.g., *Davidson v. Dixon*, 386 F. Supp. 290 (D. Del. 1974).

186. See, e.g., *Hicks v. Herring*, 246 S.C. 429, 437, 144 S.E.2d 151, 155 (1965); *Pan Am. Petroleum Corp. v. Hardy*, 370 S.W.2d 904, 908 (Tex. Ct. Civ. App. 1963). In Michigan and New Hampshire, punitive damages are limited to an amount that will fully compensate the plaintiff. See *Oppenhuizen v. Wennersten*, 2 Mich. App. 288, 139 N.W.2d 765 (1965); *Vratsenes v. New Hampshire Auto, Inc.*, 112 N.H. 71, 289 A.2d 66 (1972). In Connecticut, punitive damages are limited in amount to the plaintiff’s litigation expenses. See *Triangle Sheet Metal Works, Inc. v. Silver*, 154 Conn. 116, 127, 222 A.2d 220, 225 (1966). See also *Cox v. Stolworthy*, 94 Idaho, 683, 496 P.2d 682 (1972).

187. See, e.g., *Alcorn v. Mitchell*, 63 Ill. 553 (1872) (spitting in plaintiff’s face); *Merest v. Harvey*, 5 Taunt. 442, 128 Eng. Rep. 761 (C.P. 1814) (shooting at game on plaintiff’s estate and use of intemperate language); *Tullidge v. Wade*, 3 Wils. K.B. 18, 95 Eng. Rep. 909 (C.P. 1769) (seducing plaintiff’s daughter under plaintiff’s roof after securing confidence of plaintiff’s family).

188. See generally *Magruder, Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936).

189. The spit in the face has, in one instance at least, been replaced by a pie in the face. The perpetrator settled in the amount of \$5,000. *N.Y. Times*, Feb. 24, 1976, at 33, col. 1 (late city ed.).

190. See *Chagnon v. Union Leader Corp.*, 103 N.H. 426, 442, 174 A.2d 825, 835-36 (1961). See generally *W. PROSSER*, *supra* note 31, § 54.

191. *Kelly*, *supra* note 42, at 283.

192. See notes 113-15 *supra* and accompanying text.

193. Thus, the derivation of the phrase “smart money” “as indicating compensation for the smarts of the injured person, and not, as now [assumed], money required by way of punishment, and to make the wrong-doer smart.” *Fay v. Parker*, 53 N.H. 342, 355 (1873).

Punitive damages also help restore the plaintiff to the financial position he occupied prior to the injury by providing a fund for the payment of litigation expenses.¹⁹⁴ Since at least a third of the plaintiff's recovery ordinarily is spent for legal fees, a verdict that does not include a sum for attorneys' fees almost always leaves the plaintiff substantially worse off financially than he was before the accident. Yet the severely criticized¹⁹⁵ but firmly established "American rule" unequivocally prohibits awards of attorneys' fees in the absence of statutory authorization.¹⁹⁶ In cases of flagrant misconduct, awards of punitive damages tend to alleviate, however imprecisely,¹⁹⁷ the rigors of the American rule.¹⁹⁸ Surely this result is desirable, since a defendant who has maliciously injured another may fairly be required to make the plaintiff truly whole again.¹⁹⁹

Both of these compensatory purposes of punitive damages awards are applicable in the products liability context. Plaintiffs injured by product defects are as deserving of full compensation for their losses as any other class of plaintiffs. It is true that persons injured by defective products do not usually suffer the personal

The practice of matching damages to the amount of vengeance reasonably aroused by the defendant's offensive act, and thereby giving the plaintiff both actual and legal "satisfaction" for his injuries, is traceable from the Code of Hammurabi, *see* G. DRIVER & J. MILES, *supra* note 17, at 500, through the law of ancient Rome, *see* note 113 *supra*, into the early English common law, *cf.* 2 Blackstone Commentaries 438, and the Prussian Code of 1794, *see* F. LAWSON, NEGLIGENCE IN THE CIVIL LAW 184 (1950, corrected ed. 1968), to present day common law, *see* Kelly, *supra* note 42, at 279, and civil law, *see* Stoll, *supra* note 17, at 3.

In view of this clearly compensatory aspect of punitive damages, it becomes apparent that characterizing aggravated damages as either exclusively punitive or compensatory overlooks their dual nature. *See* Stoll, *supra* note 17, at 6-13; *cf.* Kelly, *supra* note 42, at 287-88. Thus, although the choice of a theory for such damages may have implications for some matters including the amount of such verdicts, for most purposes the debate over the legitimacy of punitive damages may have been nothing more than a tempest in a teapot. *See* note 22 *supra*.

194. *See* C. McCORMICK, *supra* note 16, at 277. *See generally* J. O'CONNELL, THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE 37-53 (1971).

195. *See, e.g.,* Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966). Criticisms of the rule are noted, and the critical literature is collected, in *Alyeska Pipeline Co. v. Wilderness Soc.*, 421 U.S. 240, 270 n.45 (1975).

196. *Sillinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573, 521 P.2d 119 (1974) (en banc); RESTATEMENT (SECOND) OF TORTS § 914 (Tent. Draft No. 19, 1973). Certain, carefully circumscribed exceptions do exist in the federal version of the rule. *See* note 154 *supra*.

197. *See* C. McCORMICK, *supra* note 16, at 277; *cf.* Peck, *Compensation for Pain: A Reappraisal in Light of New Medical Evidence*, 72 MICH. L. REV. 1355, 1373-74 (1974).

198. *See* *Vaughn v. Atkinson*, 369 U.S. 527, 540 (1962) (Stewart, J., dissenting); *Schlein v. Smith*, 160 F.2d 22 (D.C. Cir. 1963).

199. *See, e.g.,* *Linsley v. Bushnell*, 15 Conn. 225, 235 (1842); C. McCORMICK, *supra* note 16, at 277.

humiliation and embarrassment caused by the dignitary torts that sparked the punitive damages remedy in the eighteenth and nineteenth centuries.²⁰⁰ "Satisfaction" for malicious, insulting behavior simply is not called for.²⁰¹ Yet many, perhaps most, personal injury victims are inadequately compensated under the present system. It has been estimated, for example, that "in big damage cases very few victims get as much as twenty-five per cent of their real economic loss."²⁰² Further, accident victims often suffer damage to emotional tranquillity, family harmony and employment security that is particularly difficult to prove and generally not compensable anyway. Moreover, the use of a large portion of the recovery for attorneys' fees is probably more burdensome to the personal injury victim, who may need the entire verdict to pay for medical, rehabilitation and special living expenses,²⁰³ than to the victim of a dignitary tort, whose only

200. Stoll, *supra* note 17, at 15-16.

201. *But see* note 126 *supra* and accompanying text.

202. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774, 780 (1967), citing CONRAD, MORGAN, PRATT, VOLTZ & BOMBAUGH, *AUTOMOBILE ACCIDENTS COSTS AND PAYMENTS* 197 (1964), and Morris & Paul, *The Financial Impact of Automobile Accidents*, 110 U. PA. L. REV. 913, 917 (1962).

203. A substantial portion of the verdict may of course represent compensation for pain and suffering, and so in many cases attorneys' fees can be paid from this part of the judgment without intruding upon amounts available to the plaintiff for his "hard" expenses. No doubt there are sound doubts concerning the logic and expedience of allowing awards for pain and suffering. *See, e.g.*, J. O'CONNELL, *supra* note 177, at 121-22; Peck, *supra* note 197. But so long as courts continue to consider this type of loss worthy of compensation, the ability of a plaintiff to apply his pain and suffering award to the payment of his litigation expenses is no remedy for the glaring defects in the American rule prohibiting awards of attorneys' fees.

Jury awards of punitive damages and those for wounded feelings and pain and suffering are often difficult to distinguish. Magruder, *supra* note 188, at 1034 n.4; RESTATEMENT (SECOND) OF TORTS § 908, comment *c* at 81 (Tent. Draft No. 19, 1973). For this reason and upon the assumption that "[t]he theory of punitive damages (without the name) is built into the average juror's value system . . .," Morris, *supra* note 16, at 226, some commentators have speculated that the availability *vel non* of the punitive damages remedy may be of little consequence, since a jury, whether or not it is expressly instructed on punitive damages, will always award an amount it deems appropriate in light of all the circumstances of the case. *See id.*; Note, 70 HARV. L. REV. 517, *supra* note 16, at 521 (1957). These commentators point to *Bass v. Chicago & N.W. R.R.*, 36 Wis. 450 (1874), 39 Wis. 636 (1876), 42 Wis. 654, 671-72 (1877), in which three separate juries awarded an identical sum, \$4,500, in three separate trials of the same case in different counties, "twice with punitive damages allowed and once without . . ." *Id.* *See also* Bauer, *The Degree of Defendant's Fault as Affecting the Administration of the Law of Excessive Compensatory Damages*, 82 U. PA. L. REV. 583 n.* (1934). Yet in most cases, jurors very probably do make a sincere effort to follow the charge of the court, and the presence or absence of a punitive damages instruction should often prove to be of substantial importance. For example, in *Brown v. Pepsi-Cola Bottling Co.*, No. 13851 (C.P. Dorchester County, S.C., Nov. 26, 1974), an action against the bottler of a soft drink for injuries resulting from contamination due to the presence of a rusty nail in the beverage, "the jury went out and brought back a question for the Judge as to whether or not they

sacrifice in paying such fees may be to relinquish part of his retaliatory "satisfaction." Punitive damages thus can serve a valuable compensatory function in products liability cases as they have in more traditional tort litigation.

III. COMPLICATING FACTORS IN ACHIEVING THE OBJECTIVES OF PUNITIVE DAMAGES IN PRODUCTS LIABILITY LITIGATION

The preceding section examined the utility of extending the punitive damages doctrine to products liability litigation and concluded that such an extension is desirable. Present in virtually every products liability case involving punitive damages, however, are the three complicating factors raised by Judge Friendly in *Roginsky v. Richardson-Merrell, Inc.*²⁰⁴ First, there is the dubious fairness or utility of punishing the innocent shareholders of a product manufacturer for the misconduct of individual employees of the company. Second, there is the probability that the manufacturer has insured itself against the risk of a punitive damages assessment and consequently may be neither deterred nor punished by such a verdict. Third, there is the difficulty of properly determining and controlling the amount of the punitive damages award. Each of these complicating factors is intertwined in products liability litigation with the various goals served by the punitive damages doctrine, and thus attention must focus on each factor to determine whether it impairs the achievement of those goals.

A. Vicarious Liability and the Innocent Shareholder

The logic and fairness of assessing punitive damages against a corporation for the misconduct of its employees has long been questioned by both courts and theorists.²⁰⁵ In the final analysis it is the shareholders who feel the sting of a verdict against the corpora-

had to segregate the \$10,000.00 they had decided on into X number of dollars actual and Y number of dollars punitive." The judge advised the jury that he had stricken the plaintiff's claim for punitive damages for insufficient proof of malice; the jury retired for another few minutes and returned with a verdict for \$3,500 compensatory damages. Letter from Reese I. Joye, Jr., to David G. Owen, July 16, 1975 (on file at *Michigan Law Review*).

204. 378 F.2d 832 (2d Cir. 1967). See text at notes 10-11 *supra*.

205. See, e.g., *Lake Shore & M.S. Ry.*, 147 U.S. 101 (1893); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967); C. McCORMICK, *supra* note 16, § 80; 1 T. SEDGWICK, *supra* note 16, at 738-43; Collier, *Exemplary Damages in Actions Against Corporations*, 55 CENT. L.J. 105 (1902); Morris, 44 HARV. L. REV. 1173, *supra* note 16, at 1199-205; Morris, 21 OHIO ST. L.J. 216, *supra* note 16; Note, *Exemplary Damages Against Corporations*, 30 GEO. L.J. 294 (1942); Note, 70 YALE L.J. 1296, *supra* note 16. Cf. Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827, 836-40 (1927).

tion,²⁰⁶ yet in most instances they are not only innocent of personal wrongdoing but also incapable of exerting any effective control over the actions of corporate employees.²⁰⁷ Why then should the shareholders be punished? This is perhaps the most difficult question concerning the appropriateness of punitive damages awards in products liability litigation.

A minority of courts, following the 1893 Supreme Court decision in *Lake Shore & M.S.R.R. v. Prentice*,²⁰⁸ has adopted a narrow rule of enterprise liability for punitive damages arising out of malicious acts of corporate employees.²⁰⁹ This doctrine, which Professor Clarence Morris named the "complicity rule,"²¹⁰ imposes liability for punitive damages upon a corporation only when a superior officer is shown to have ordered, participated in, or ratified the misconduct.²¹¹ The rule permits corporate liability on proof of such direct

206. See, e.g., *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 841 (2d Cir. 1967). See generally MODEL PENAL CODE § 2.07(1)(c), comment at 148 (Tent. Draft No. 4, 1955); Hamilton, *supra* note 163, at 70-71. Others may also feel the bite of a punitive damages judgment against a business enterprise, even if less directly, including its employees, suppliers, customers and creditors. See Morris, *supra* note 177, at 585-87. A particularly heavy punitive damages verdict that results in layoffs of employees might well have repercussions throughout the entire community. See DuBois, *supra* note 9, at 349.

207. See MODEL PENAL CODE § 2.07(1)(c), comment at 148 (Tent. Draft No. 4, 1955).

208. 147 U.S. 101 (1893).

209. See 10 W. FLETCHER, PRIVATE CORPORATIONS § 4906, at 371 (rev. vol. 1970); W. PROSSER, *supra* note 31, at 12; Note, 70 HARV. L. REV. 517, *supra* note 16, at 526. But see Note, 70 YALE L.J. 1296, *supra* note 16, at 1300 (asserting courts equally divided); C. McCORMICK, *supra* note 16, at 282 (asserting it to be a majority view).

The narrow rule of enterprise liability has been accepted by the American Law Institute:

§ 909. PUNITIVE DAMAGES AGAINST A PRINCIPAL

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,

- (a) the principal authorized the doing and the manner of the act, or
- (b) the agent was unfit and the principal was reckless in employing him, or
- (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
- (d) the principal or a managerial agent of the principal ratified or approved the act.

RESTATEMENT (SECOND) OF TORTS § 909 (Tent. Draft No. 19, 1973). An identical section is found in the RESTATEMENT (SECOND) OF AGENCY § 217 C (1958). Yet even the drafters of these sections were unenthusiastic about the rule. In a "Note to Institute" following section 909, the reporter of the Restatement of Torts indicated that "some of the Torts group, on sober second thought, were in doubt whether the position taken was the right one . . ." and that the Torts Advisers voted 9 to 2 to strike the section. The section was retained, however, because of the reference to section 909 in the RESTATEMENT (SECOND) OF AGENCY § 217 C, Comment a (1958). Apparently neither the tort law nor the agency law scholars wished to take credit for the rule.

210. Morris, 21 OHIO ST. L.J. 216, *supra* note 16, at 221.

211. *Id.* See, e.g., *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 842 (2d

involvement by a superior officer because "the imposition of punitive damages serves as a deterrent to the employment of unfit persons in important positions."²¹² The rationale of courts following this narrow rule of responsibility is the supposed inequity of punishing a blameless corporation and its shareholders²¹³ whose interests are in fact often undermined by malicious acts of low-level employees.

Another group of courts has adopted the so-called vicarious liability rule,²¹⁴ which holds a corporation liable for punitive damages for the wanton misconduct of *all* employees acting within the general scope of their employment. Supporters of this rule, which appears to represent the majority position in this country,²¹⁵ assume that strict enterprise liability for wanton misbehavior of low-level employees will encourage care in the selection and supervision of such personnel.²¹⁶ The continuing debate²¹⁷ between supporters of the complicity and vicarious liability rules of punitive damages is beginning to spill over into products liability litigation.²¹⁸

Cir. 1967). Some courts have permitted ratification to be established by a showing that the corporation retained the employee after discovery of his misdeed. See *Morris*, 44 HARV. L. REV. 1173, *supra* note 16, at 1203-04. But apparently this is no longer accepted practice. RESTATEMENT (SECOND) OF AGENCY § 217C, comment *b* (1958). See *Sullivan v. Matt*, 130 Cal. App. 2d 134, 278 P.2d 499 (1955).

212. RESTATEMENT (SECOND) OF TORTS § 909, comment *a* at 86 (Tent. Draft No. 19, 1973). It is interesting to note that this is the same justification used to support the broader vicarious liability rule. See note 216 *infra* and accompanying text.

213. See *W. PROSSER*, *supra* note 31, at 12; Note, 41 N.Y.U. L. REV. 1158, *supra* note 16, at 1166-67; Note, 70 YALE L.J. 1296, *supra* note 16, at 1306-07.

214. See *Morris*, 21 OHIO ST. L.J. 216, *supra* note 16, at 220.

215. It has been called the "better rule." 10 W. FLETCHER, *supra* note 209, § 4906, at 371.

216. See *C. McCORMICK*, *supra* note 16, at 284-85; *W. PROSSER*, *supra* note 31, at 12. The classic expression of this reasoning was set forth in *Goddard v. Grand Trunk Ry.*, 57 Me. 202, 224 (1869):

[U]nder cover of [the corporate] name and authority, there is in fact as much wickedness, and as much that is deserving of punishment, as can be found anywhere else. And since these ideal existences can neither be hung, imprisoned, whipped, or put in the stocks . . . the doctrine of exemplary damages is more beneficial in its application to them, than in its application to natural persons. . . . There is but one vulnerable point about . . . corporations; and that is, the pocket of the monied power that is concealed behind them; and if that is reached they will wince. When it is thoroughly understood that it is not profitable to employ careless and indifferent agents, or reckless and insolent servants, better men will take their places, and not before.

Two other considerations support the broad rule. First, "the practical difficulty of proving employer authorization necessitates a presumption conclusive of such conduct." Note, 70 YALE L.J. 1296, *supra* note 16, at 1301. See *C. McCORMICK*, *supra* note 16, at 285. Second, "the rule of unrestricted corporate liability has the great merit of workable simplicity." *Id.* But see Note, 70 YALE L.J. 1296, *supra* note 16, at 1301-04.

217. See authorities cited in note 205 *supra*.

218. Compare *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 841 (2d Cir. 1967) ("[A] sufficiently egregious error as to one product can end the business life

The law of corporate criminal responsibility raises many of the same questions concerning the fairness and utility of punishing shareholders that are raised in the debate over the appropriate limits of corporate punitive damages liability.²¹⁹ The criminal law generally imposes vicarious criminal liability upon a corporation only for limited acts of gross misconduct by high managerial personnel.²²⁰ This limitation on enterprise responsibility closely parallels the complicity rule of punitive damages law.²²¹ In some instances, however, particularly in cases involving certain regulatory and public welfare offenses detrimental to the public health, vicarious criminal liability is imposed on the corporation without regard to the offending employee's managerial rank.²²² An understanding of the reasons for imposing criminal fines upon corporations, penalties ultimately borne by shareholders, should help determine whether the complicity or vicarious liability rule of punitive damages should be applied in products liability litigation.

The principal justification for imposing criminal liability upon a corporation is, simply, its deterrent effect.²²³ Corporations are just

of a concern that has wrought much good in the past and might otherwise have continued to do so in the future, with many innocent stockholders suffering extinction of their investments for a single management sin"), with *Pease v. Beech Aircraft Corp.*, 38 Cal. App. 3d 450, 466, 113 Cal. Rptr. 416, 427 (1974) ("No sufficient reason appears why shareholders should be seen as captive innocent hostages to the inhuman management of a corporate juggernaut").

219. See generally RESTATEMENT (SECOND) OF AGENCY §§ 217C, D (1958) (corporate punitive and criminal liabilities respectively). On the general topic of corporate criminal responsibility, see MODEL PENAL CODE § 2.07 (Proposed Official Draft 1962); MODEL PENAL CODE § 2.07, Comment at 146-55 (Tent. Draft No. 4, 1955); Edgerton, *supra* note 114; Hamilton, *supra* note 163; Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21 (1957).

220. See MODEL PENAL CODE § 2.07(1)(c) (Proposed Official Draft 1962); MODEL PENAL CODE § 2.07, comment at 151 (Tent. Draft No. 4, 1955); RESTATEMENT (SECOND) OF AGENCY § 217 D, comment *d* (1958).

221. MODEL PENAL CODE § 2.07, at 151 (Tent. Draft No. 4, 1955); RESTATEMENT (SECOND) OF AGENCY § 217 D, comment *d* (1958).

222. MODEL PENAL CODE § 2.07(1)(a) (Proposed Official Draft 1962); MODEL PENAL CODE § 2.07, at 147 (Tent. Draft No. 4, 1955); RESTATEMENT (SECOND) OF AGENCY § 217 D, comment *b* (1958).

223. MODEL PENAL CODE § 2.07, at 148 (Tent. Draft No. 4, 1955); Hamilton, *supra* note 163, at 69. See also A. GOODHART, *supra* note 121, at 86 ("Fear of criminal prosecution significantly improves the general level of compliance with regulatory statutes, and particularly where acquisitive acts . . . are involved, the criminal sanction may be absolutely essential if the system is not to break down"). The deterrent effect is derived primarily from the prospect of a depletion in corporate assets that would result from the imposition of a criminal fine or a punitive damages judgment. Deterrence is also achieved in other ways. An adjudication of criminal guilt or wanton misbehavior against the corporation may indicate mismanagement and accordingly may lead either to a proxy fight or to a stockholder's derivative suit against the responsible persons in their individual capacity. Although the risk of either is slight, the mere possibility of either should serve as an added incentive

as capable as individuals of engaging in conduct intolerably detrimental to the public welfare, and their aggregation of resources magnifies their potential for inflicting harm. For example, the sale of food and drugs involves a significant risk of causing serious injury to many persons if those products are impure. Thus, the criminal law requires in these situations that the shareholders be punished to achieve the greater good of protecting the public health and welfare.²²⁴ Consumers necessarily rely on the ability and willingness of enterprises to market only safe foods and drugs, and the threat of criminal penalties for failures that pose a substantial risk of public harm will arguably encourage greater care in the operation of such enterprises.²²⁵

Since many product manufacturers have a degree of control over the well-being of the consuming public equivalent to that of food and drug producers, the prevention of needless injury necessitates the use in all products liability litigation of sanctions similar in effect to those used in food and drug cases. Food and drugs are not the only products whose purity is of fundamental concern to society, for thousands of other products must also be consumed on a daily basis. It thus seems as important to deter the marketing of insufficiently fire-retardant clothes and "uncrashworthy" automobiles as it is to hinder the marketing of impure food and drugs. If a broad rule of corporate punitive damages liability can indeed avert significant numbers of product accidents,²²⁶ perhaps some blameless shareholders should occasionally have to shoulder the burden of penalties resulting from the flagrant misconduct of their corporation's employees.

to management to avoid questionable conduct. See Hamilton, *supra* note 163, at 73-75.

224. One commentator has argued that

[t]he only serious harm which [corporate responsibility] can do, consists in the injury to those really innocent stockholders who have nothing to do with the crime and no real opportunity of preventing it. This injury is regrettable; but . . . the balance of advantage seems to require subordinating their interest to the general interest. However "innocent" the owners of the corporate enterprise may be, the general interest requires that . . . corporate representatives be deterred, so far as corporate responsibility can deter them, from conducting the business in criminal ways.

Edgerton, *supra* note 114, at 836-37. See Note, 41 N.Y.U. L. REV. 1158, *supra* note 16, at 116. See generally Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

225. See note 175 *supra*; cf. *United States v. Park*, 421 U.S. 658 (1975). Similarly, the general compensatory damage rule of vicarious liability of employers for the misconduct of their employees arose at an early date because of the confidence consumers necessarily repose in their suppliers. See O. HOLMES, *THE COMMON LAW* 16 (1881). See generally 10 W. FLETCHER, *supra* note 209, § 4906, at 371 (vicarious liability rule for punitive damages is "the only rule compatible with public policy and safety").

226. See notes 129-51 *supra* and accompanying text.

Yet shareholder liability may be justified on grounds other than stark social necessity. It is, of course, the supposed innocence of the shareholders that makes the punishment of a corporation seem unjust.²²⁷ But this concept of shareholder innocence needs to be examined. Certainly the shareholders of a publicly held corporation are rarely blameworthy in a moral sense for the misconduct of its employees. Punitive damages are consistent with this view, for they do not assign blame to shareholders personally, but, as a practical matter, merely deplete the corporate treasury. This distinction is important, for in most cases the decisions of employees to market defective products in flagrant disregard of excessive dangers spring from the intensity of the profit motive rather than from animus toward consumers.²²⁸ To the extent that such products are excessively dangerous, however, the profits resulting from their sale are in a very real sense "excessive profits."

Thus, the recovery of these excessive profits through punitive damages awards can be viewed as the recoupment of an unjust enrichment of the corporation and its shareholders rather than as the punishment of either the corporation or its shareholders.²²⁹ Punitive damages admittedly are an imprecise mechanism for achieving

227. Of course to the extent that punitive damages are compensatory rather than punitive, holding the corporation strictly responsible for them under the vicarious liability rule should be acceptable according to traditional notions of respondeat superior and enterprise responsibility. See Edgerton, *supra* note 114, at 836-37; Lambert, *supra* note 16, at 179.

228. See MODEL PENAL CODE § 2.07, Comment at 148-49 (Tent. Draft No. 4, 1955):

[T]here are probably cases in which the economic pressures within the corporate body are sufficiently potent to tempt individuals to hazard personal liability for the sake of company gain, especially where the penalties threatened are moderate and where the offense does not involve behavior condemned as highly immoral by the individual's associates. This tendency may be particularly strong where the individual knows that his guilt may be difficult to prove . . .

[T]he violation may have been produced by pressures on the subordinates created by corporate managerial officials even though the latter may not have intended or desired the criminal behavior and even though the pressures can only be sensed rather than demonstrated.

See also Andenaes, 114 U. PA. L. REV. 949, *supra* note 130, at 959-60. Even some commentators who oppose responsibility for punitive damages upon corporations for malicious conduct of low-level employees concede that it may be justified in cases in which the misbehavior was pursued in furtherance of corporate objectives. See Morris, 21 OHIO ST. L.J. 216, *supra* note 16, at 218-19 ("Their superiors might secretly applaud their misplaced zeal—if it cost the corporation nothing this time and might protect its special interests in the future"); Note, 70 YALE L.J. 1296, *supra* note 16, at 1301 & n.7, 1307-08 n.60, 1310.

229. Cf. MODEL PENAL CODE § 2.07, Comment at 150 (Tent. Draft No. 4, 1955); Hamilton, *supra* note 163, at 75. One drawback in relying upon criminal fines to accomplish this recoupment is that the economic benefit to the corporation from the law violation in many cases will exceed the maximum fine prescribed by statute. See *id.* Punitive damages assessments, however, have a flexibility peculiarly suited for effectively achieving a complete recoupment of all "excess" profits.

this objective, and shareholders will in fact be penalized when punitive damages awards exceed excessive profits.²³⁰ Yet this penalty may be viewed as a fair assessment against both the manufacturing entity for its willingness to gamble recklessly with the public safety²³¹ and the shareholders for whose benefit the marketing decision was made.

The weakening of the blameless shareholder argument undermines the reasons for adhering to the restrictive complicity rule. Moreover, application of the complicity rule in products liability cases would largely impede the objectives of punitive damages. Only the most extreme forms of manufacturer misconduct would ever be punished under the complicity rule,²³² and then only when the manufacturer was imprudent enough to create, preserve and relinquish evidence of participation by its upper-level management in some improper conduct.²³³ Documentary evidence of flagrant misconduct by managerial employees rarely exists and, when it does, it may never be located by even the most diligent discovery and investigative procedures. Thus, while upper-level management is probably frequently aware, if sometimes only intuitively, of seriously improper safety decisions made lower down the corporate ladder, the complicity rule

230. See Hamilton, *supra* note 163, at 75; cf. MODEL PENAL CODE § 2.07, comment at 150 (Tent. Draft No. 4, 1955).

231. See Hamilton, *supra* note 163, at 75. Indeed, punishment over and above recoupment must, in each case, be proportionate to the probability that the violation may go undetected, so that a manufacturer will not view the "fine" as a "license fee for the conduct of an illegitimate business." See notes 158-71 *supra* and accompanying text.

232. See *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 803, 22 S. 53, 58 (1897) ("If corporations—artificial beings who can act only through agents and servants . . .—can never be held liable in punitive damages for the acts of their servants unless expressly authorized by them, no matter how gross and outrageous the wrongful act of the servant, we feel perfectly safe in declaring that no recovery for more than mere compensatory damages will ever again be awarded against corporations"). *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 842-50 (2d Cir. 1967), is clear proof that the complicity rule permits manufacturers guilty of the most egregious forms of anti-social conduct to escape liability for punitive damages. See text at notes 336-51 *infra*.

233. In one instance, an incriminating test report "was concealed from plaintiffs and the FAA until after plaintiffs discovered the nature of this report from reading other reports and specifically demanded its production." Plaintiff's Memorandum in Opposition to Motion for Partial Summary Judgment at 4, *Engbreth v. Fairchild Hiller Corp.*, Civ. No. A-9-71 (D. Alas., filed Jan. 18, 1971). See text at notes 424-31 *infra*. In another case, *Sabich v. Outboard Marine Corp.*, 60 Cal. App. 3d 591, 131 Cal. Rptr. 703 (1976), discussed in text at notes 403-06 *infra*, counsel for the plaintiff reported that the defendants admitted under oath "that between 25 and 50 rolls of test film (each 50 feet in length) had been destroyed prior to the taking of their testimony." Letter from Daniel E. Wilcoxon to David G. Owen, July 16, 1975).

as a practical matter will often shield even the most culpable manufacturers from liability for punitive damages.²³⁴

←Most product safety decisions are made by middle- and lower-middle management.²³⁵ For example, engineers and scientists make frequent decisions on the design, composition and testing of their products, including the ascertaining of acceptable levels of product impurity or "defectiveness."²³⁶ These employees, or their supervisors, also decide how much time they should devote to staying abreast of recent developments in their fields. Similarly, production managers make crucial decisions on assembly-line procedures, and quality control personnel decide both how many "bad" products should be allowed to slip through to consumers and the degree of defectiveness required before such products are screened out. Marketing managers make decisions, first, on how informed they should become on dangers associated with their products and, second, on how much of this information should be passed along to consumers. Sales personnel decide how much information on product failures should be solicited from customers and how much should be passed back to the engineering, production, and marketing departments. Finally, the engineering, production, and marketing personnel receiving such information on failures in the field must decide whether and what remedial action may be necessary.

All of these decisions are largely made by middle management. Upper-level management can inject itself however much it wishes into this process of product safety decision-making. If high-level management learns that one sure way to avoid punitive damages judgments is to remain ignorant of product safety problems, the message will clearly go down at many organizations that product safety is to be the exclusive concern of middle management. Application of the complicity rule in products liability litigation thus would encourage the creation of an information gap between middle and upper management.

However, a perceptive court or jury in a complicity rule jurisdiction might find that the conduct of corporate officers in shielding themselves in this manner from important product safety problems

234. Members of upper management are in fact implicated on rare occasions. See *Gillham v. Admiral Corp.*, 523 F.2d 102, 106 (6th Cir. 1975) (president); *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967) (Director of the company's Biological Science Division).

235. See generally I. GRAY, *PRODUCT LIABILITY—A MANAGEMENT RESPONSE* ch. 6 (1975); G. PETERS, *PRODUCT LIABILITY AND SAFETY* 57-98 (1971).

236. See Weinstein, Twerski, Piehler & Donaher, *supra* note 50, at 430-33 n.11, 447. "Since all products are flawed at some technological level, the decision must still be made as to when a flaw emerges as a defect." *Id.* at 430-31.

amounts to a flagrant disregard of the public safety. Alternatively, upper management's creation or even toleration of such an information gap might be construed as blanket authorization or even ratification of all product safety decisions made below, so that the reckless safety decisions of middle management could be imputed to the manufacturer in any event.²³⁷ Such twisting of legal concepts should be avoided, however, since a more direct solution is available.

Probably the best solution is to reject the complicity rule of punitive damages in products liability litigation altogether and to adopt instead the broader rule of vicarious liability.²³⁸ Since manufacturers would then be responsible for the reckless activities of employees at all levels, the deterrent effect of potential punitive damages awards would be considerably increased. Upper-level management of well-counselled enterprises could then be expected to respond by participating in major product safety decisions at all stages of the manufacturing and marketing process. As ultimate responsibility for important safety decisions is thereby shifted to upper management, many manufacturers would probably adopt improved procedures for gathering, transmitting, and using product safety information. Eventually, safety would become routinely considered in decisions concerning profit maximization and thus become institutionalized within the manufacturing enterprise.

While competing goals of particular enterprises will undoubtedly impede this development in some cases, the vicarious liability rule of punitive damages should substantially promote the broad objectives of punitive damages in the products liability context. The complicity rule, on the other hand, serves this purpose inadequately.

237. This could be achieved procedurally by shifting the burden of proof on the issue of authorization or ratification to the manufacturer, *see* Note, 70 YALE L.J. 1296, *supra* note 16, at 1301 n.37, or even by creating an irrebuttable presumption of corporate approval, *cf. id.* at 1301, 1307-08 n.60. *See generally* Cohen, Book Review, 62 VA. L. REV. 259, 262 (1976).

238. It might be desirable to modify the usual "scope of employment" test of the vicarious liability rule to a somewhat narrower "scope of employment in behalf of the corporation" test. *See* MODEL PENAL CODE § 2.07, comment at 147 (Tent. Draft No. 4, 1955). *See also* Western Coach Corp. v. Vaughn, 9 Ariz. App. 336, 338, 452 P.2d 117, 120 (1969) ("in furtherance of the employer's business and acting within the scope of employment"). Thus narrowed, the vicarious liability rule would, for example, hold a manufacturer responsible for harm resulting from fabricated test results submitted to the FDA by a company scientist but would shield an enterprise from punitive damages arising out of the insertion of a razor blade into a bar of soap by a psychopathic assembly line employee. The line is easily and logically drawn at this point since management could take reasonable steps to prevent the misconduct in the first case but probably could do very little to prevent the truly malicious form of misbehavior in the second.

An employee's failure to act appropriately upon receipt of apparently important information concerning a product danger presents other problems. *See* note 495 *infra*.

That blameless shareholders will be punished in some cases is unfortunate, but it is a price that must be paid in the pursuit of optimal product safety.

B. *Liability Insurance for Punitive Damages*

Just as the complicity rule frustrates the achievement of punishment and deterrence, so also do rules that permit manufacturers to insure against the risk of punitive damages liability. It is axiomatic that these objectives can be attained only in so far as the wrongdoers are in fact punished. To the extent that wrongdoers can use indemnification agreements to shift punishment to third parties, both the retributive and deterrent effects of the punishment will be shifted away as well. Thus, if manufacturers are permitted to insure against punitive damages awards, such verdicts will only minimally achieve their objectives.

The adverse effect of liability insurance on the deterrent function of tort law in general is well established.²³⁹ Several years ago, a study by Professor William Whitford indicated that insurance may impede deterrence in the products liability context.²⁴⁰ He found that some manufacturers relied heavily upon their insurance to protect themselves from liability for compensatory damages resulting from inadequate safety decision-making²⁴¹ and concluded that because of this, "products liability litigation usually has little direct impact on product design or warning decisions."²⁴² Similarly, one insurance expert asserted that at least some manufacturers regard liability insurance as a cost-saving substitute for product safety programs.²⁴³

239. In one commentator's view,

The deterrent function of the law of torts was severely, perhaps fatally, undermined by the advent of liability insurance. . . . The basic assumption of the penal theory had always been that the financial impact of an adverse verdict would serve to warn the tort-feasor and others against the consequences of substandard conduct. But it could have such an educative effect only so long as he would feel that deterrent lash. Liability insurance cushioned him against its impact in advance, and thus removed the primary incentive toward the observance of care

Fleming, *The Role of Negligence in Modern Tort Law*, 53 VA. L. REV. 815, 823-24 (1967). See generally James, *supra* note 177.

240. The research, conducted for the National Commission on Product Safety, revealed that insurers for a number of manufacturers handled all products liability claims. "In some instances, the manufacturers apparently do not even inform themselves of the final resolution of the claims, and for these manufacturers it is obvious that a court decision will have no direct effect on product design or warning decisions." NCPS SUPPLEMENT STUDIES, *supra* note 176, at 228.

241. *Id.*

242. *Id.*

243. See *id.* at 264.

A recent Department of Commerce study, however, casts considerable doubt on the continuing validity of these conclusions.²⁴⁴ Noting the dramatic increases in recent years in products liability claims,²⁴⁵ the average loss per claim,²⁴⁶ insurance premiums,²⁴⁷ and policy cancellations,²⁴⁸ the study reveals a crisis in the field of products liability insurance that is "extensive and . . . increasing in scope and severity at a rapid rate"²⁴⁹ as manufacturers find it more difficult to obtain adequate and affordable coverage. The study even offers the distressing conjecture that "[p]roblems associated with product liability are potentially more formidable than in medical malpractice insurance."²⁵⁰

The contemporary deterrent impact of compensatory and punitive damages awards in products liability litigation must be evaluated in light of the specific findings of the Commerce Department study. First, and perhaps most importantly, researchers found that many manufacturers are attempting to cope with the insurance problem by adopting such "risk control techniques" as improving both the design of their products and their quality control procedures.²⁵¹ Second, products liability insurance generally is written on a retrospective or "loss-rated" basis in which premiums are calculated primarily on the manufacturer's past loss experience.²⁵² Deductible provisions are more frequently being required by insurers, and the amount of such deductibles is increasing.²⁵³ Moreover, insurance companies are

244. See DOC, PROD. LIAB. INS. STUDY, *supra* note 176.

245. *Id.* at 8.

246. *Id.* (from \$11,644 in 1965 to \$79,940 in 1973—an increase of 686% in eight years versus a 60% increase in the general price index).

247. *Id.* at 9, 10, 15, 50, 53, 55, 68, 72. "Increases reported [to the Small Business Administration] in 1975 ranged from 100 percent to over 800 percent. . . . Cumulative increases over the past 7 years have been reported to be in excess of 5,000 percent." *Id.* at 72. The liability insurance premium of one mechanical power press manufacturer, for example, is reported to have risen from \$3000 in 1968 to \$168,000 in 1975. *Id.* at 53.

248. *Id.* at 10, 47, 68.

249. *Id.* at ii.

250. *Id.* at 13.

251. *Id.* at 9, 11, 35-36, 56. "Many types of risk management approaches are being used by companies to deal with product liability. They include both risk control and risk finance techniques. Risk control involves risk avoidance (*e.g.*, product redesign), loss prevention (*e.g.*, quality control), and loss reduction (*e.g.*, product recall)." *Id.* at 9.

252. *Id.* at 32-33. To the extent that a manufacturer's insurance rates are based upon its prior products liability loss experience, it should indeed feel the punch of a damages verdict over time. See NCPS SUPPLEMENTAL STUDIES, *supra* note 176, at 261. See generally Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554, 560-74 (1961).

253. DOC, PROD. LIAB. INS. STUDY, *supra* note 176, at 37, 47, 55, 73-74.

increasingly cancelling the coverage of manufacturers with poor records.²⁵⁴ The study reports that some companies are even operating with no products liability insurance at all, because of the high cost or because insurers have refused to underwrite either the particular company or the industry as a whole.²⁵⁵ And some manufacturers are simply giving up, by dropping lines of high risk products²⁵⁶ or, in some instances, by going out of business altogether.²⁵⁷ In combination, these developments compel the conclusion that products liability litigation is increasingly forcing manufacturers to improve product safety even when they are insured against claims for product injuries.²⁵⁸

Yet products liability insurance does to some extent diminish the retributive and deterrent effects of damages judgments. This disincentive to improve product safety is generally a necessary sacrifice that assures compensation for victims of product accidents and permits manufacturers guilty only of inadvertent errors to protect themselves against unpredictable future losses. It is an entirely different matter, however, when a manufacturer guilty of an aggravated act of misconduct has insured against a punitive damages award. The accident victim, it may be assumed, has already received substantial compensation for his injuries,²⁵⁹ and so the principal question that remains is whether public policy should prevent an insured from obtaining indemnity in such cases.

Faced with this question, usually in cases involving reckless driving,²⁶⁰ courts in recent years have split into two opposing camps. One line of cases follows Judge Wisdom's 1962 Fifth Circuit decision

254. *Id.* at 36, 47, 55, 68. See also NCPS SUPPLEMENTAL STUDIES, *supra* note 176, at 261, 263.

255. DOC, PROD. LIAB. INS. STUDY, *supra* note 176, at 15, 36, 46-47, 55, 68, 72, 81-85.

256. *Id.* at 56.

257. *Id.* at 84 (Havir Manufacturing Company in St. Paul, Minnesota). See *Bexiga v. Havir Mfg. Co.*, 60 N.J. 402, 290 A.2d 281 (1972).

258. An additional factor that diminishes the manufacturer's ability to shield itself from liability is a standard provision in the insurance contract itself "which requires a corporation, after it becomes aware of its defective product, to take steps to correct it or recall it. If the company (insured) doesn't take such reasonable steps, the insurance carrier may deny liability on subsequent claims." T. KEATING, in COMPANY PROGRAMS TO REDUCE PRODUCTS LIABILITY HAZARDS: A TRANSCRIPT OF A MAPI SEMINAR 103 (June 15-16, 1972).

259. See note 265 *infra*.

260. For a collection of the cases, see Annot., 20 A.L.R.3d 343 (1968). See generally Gonsoulin, *Is an Award of Punitive Damages Covered Under an Automobile or Comprehensive Liability Policy?*, 22 Sw. L.J. 433 (1968); Lambert, *supra* note 16, at 180-86, 194 n.72; Long, *Insurance Protection Against Punitive Damages*, 32 TENN. L. REV. 573 (1965); Comment, *Insurer's Liability for Punitive Damages*, 14 Mo. L. REV. 175 (1949).

in *Northwestern National Casualty Co. v. McNulty*,²⁶¹ which held that automobile liability insurance provisions covering punitive damages awards²⁶² contravene public policy and thus should not be enforced.²⁶³ The *McNulty* court's reasoning was cogent: "Where a person is able to insure himself against punishment he gains a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct."²⁶⁴ Certainly a jury returning a punitive damages verdict against a defendant for an aggravated act of misconduct will usually contemplate that the bite of the verdict will be felt by the wrongdoer, not by some unknown insurance company that may in turn increase its rates and thereby pass the punishment along to consumers. Thus, *McNulty* and its progeny stress the negative impact of insurance on the punitive and deterrent purposes of punitive damages awards and accordingly minimize their compensatory role.²⁶⁵

A contrary line of cases, led by the 1964 Tennessee decision in *Lazenby v. Universal Underwriters Insurance Co.*,²⁶⁶ emphasizes

261. 307 F.2d 432 (5th Cir. 1962).

262. If the insurance policy does not expressly or impliedly cover punitive damages losses, the public policy issue of course need not be addressed. See, e.g., D. DOBBS, *supra* note 16, at 216. If the manufacturer's conduct manifests a wilfully unlawful exposure of consumers to a known defect, there may even be an express exclusion in the insurance contract for compensatory as well as punitive damages. See NCPS SUPPLEMENTAL STUDIES, *supra* note 176, at 260 ("The products liability policy covers only occurrences which are neither 'expected nor intended from the standpoint of the insured'"); Note, 70 YALE L.J. 1296, *supra* note 16, at 1309 n.66. See note 258 *supra*.

263. 307 F.2d at 434.

264. The court further reasoned as follows: "It is not disputed that insurance against criminal fines or penalties would be void as violative of public policy. The same public policy should invalidate any contract of insurance against the civil punishment that punitive damages represent." 307 F.2d at 440.

265. See, e.g., *Smith v. Merchants Mut. Bonding Co.*, 211 Kan. 397, 405, 507 P.2d 189, 196 (1973):

Where exemplary damages are awarded for purposes of punishment and deterrence, as is true in this state, public policy should require that payment rest ultimately as well as nominally on the party who committed the wrong; otherwise they would often serve no useful purpose. The objective to be obtained in imposing punitive damages is to make the culprit feel the pecuniary punch, not his guiltless guarantor. Compensatory damages, we might add, would not be affected by such a policy. They stand to be paid as any actual damages are cared for.

Id. See also *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 841 (2d Cir. 1967). In *McNulty*, Judge Wisdom noted the paradox of allowing a defendant to pass the punishment to his insurance carrier who then, in the form of higher premiums, passes it to the public: "Society would then be punishing itself for the wrong committed by the insured." 307 F.2d at 441. Professor Morris once made the colorful suggestion that contracts insuring against punitive damages "could be declared illegal and put in the same category as assistance in a jail break." Morris, 24 ILL. L. REV. 730, *supra* note 16, at 560-74.

266. 214 Tenn. 639, 383 S.W.2d 1 (1964).

instead an insurer's usual contractual obligation to compensate the insured for "all sums which the insured shall become legally obligated to pay as damages."²⁶⁷ These cases stress the inequity of allowing an insurer to reap a windfall by denying coverage it has not expressly excluded from the contract at the expense of the insured who expects to be protected against all liability. The courts following *Lazenby* thus seek to protect a presumed contractual right, but they have never addressed the anomaly of allowing a defendant to insure against the risk of judicial punishment.²⁶⁸

In the cases following *Lazenby*, only the concurring opinion of Chief Justice Donaldson of the Idaho supreme court in *Abbie Uriguen Oldsmobile Buick, Inc. v. United States Fire Insurance Co.*²⁶⁹ has attempted to analyze the functional impact of punitive damages insurance. Justice Donaldson recognized the logical difficulty of reconciling the objectives of punishment and deterrence with a rule permitting a defendant to insure against punitive damages. Nevertheless, he reasoned that insurance coverage of punitive damages verdicts should not be considered repugnant to public policy because it promotes law enforcement by encouraging plaintiffs to sue defendants guilty of particularly antisocial conduct.²⁷⁰ This analysis, however, fails to recognize that private enforcement of the law is desirable principally because of its punitive and deterrent impact on serious misbehavior. Thus encouragement of litigation is not itself a primary goal but rather a means of achieving these more fundamental goals.²⁷¹ From this perspective, the logical inconsistency of Justice Donaldson's argument is readily apparent: A rule allowing insurance coverage for punitive damages is adopted in part because it promotes the sub-goal of encouraging litigation of wantonly inflicted injury; litigation of these claims is desired to advance the primary goals of punishment and deterrence; yet punishment and

267. See, e.g., *Pennsylvania Thresherman & Farmers' Mut. Cas. Ins. Co. v. Thornton*, 244 F.2d 823 (4th Cir. 1957); *Price v. Hartford Accident & Indem. Co.*, 108 Ariz. 485, 502 P.2d 522 (1972) (en banc); *Southern Farm Bureau Cas. Ins. Co. v. Daniel*, 246 Ark. 849, 440 S.W.2d 582 (1969); *Abbie Uriguen Oldsmobile Buick, Inc. v. United States Fire Ins. Co.*, 95 Idaho 501, 511 P.2d 783 (1973); *Carroway v. Johnson*, 245 S.C. 200, 139 S.E.2d 908 (1965).

268. See notes 264, 265 *supra*.

269. 95 Idaho 501, 509, 511 P.2d 783, 791 (1973) (special concurring opinion of Donaldson, C.J.).

270. 95 Idaho at 509, 511 P.2d at 791.

271. It is also a means of achieving the additional goal of compensation. See notes 112 & 152 *supra*. Justice Donaldson himself recognized deterrence as "the predominant public policy purpose" supporting the punitive damages doctrine. See 95 Idaho at 509, 511 P.2d at 731.

deterrence are themselves largely defeated by application of the rule.

The punitive damages objectives of punishment and deterrence should clearly be permitted to prevail over the wrongdoer's expectation of contractual protection against liability for acts of aggravated misconduct.²⁷² This is especially true in the products liability field for several reasons. First, a rule prohibiting insurance coverage of punitive damages is more likely to deter the potential misconduct of manufacturers attempting to maximize profits than that of drivers whose capabilities are impaired by intoxicants.²⁷³ Second, a business enterprise that wantonly endangers hundreds or thousands of consumers will usually be beyond the reach of the criminal law, whereas an intoxicated driver who causes an accident faces a substantial risk of criminal punishment.²⁷⁴ Finally, the expectations of the manufacturer who knowingly markets a defective product are probably less deserving of protection than the expectations of the intoxicated driver. Probably few drivers purchase liability insurance deliberately so that they can drive around in an intoxicated condition free of financial risk. Yet manufacturers probably quite often view insurance as a means of avoiding the burdens of legal safety obligations.²⁷⁵ Thus, at least in the context of products liability litigation, insurance coverage for punitive damages assessments should be prohibited as contrary to public policy.²⁷⁶

272. See W. PROSSER, *supra* note 31, at 13; Note, 70 HARV. L. REV. 517, *supra* note 16, at 527; Note, *supra* note 203, at 1049.

273. Cf. *Northwestern Natl. Cas. Co. v. McNulty*, 307 F.2d 432, 444 (5th Cir. 1962) (special concurring opinion of Gewin, J.).

274. Cf. 307 F.2d at 444; *Price v. Hartford Accident & Indem. Co.*, 108 Ariz. 485, 487, 502 P.2d 522, 524 (1972) (en banc).

275. See note 243 *supra* and accompanying text. There is one final reason for prohibiting manufacturers from insuring against punitive damages. Such a policy would help to moderate the liability insurance cost spiral that is increasingly plaguing manufacturers. See notes 244-58 *supra* and accompanying text. Indeed, the Department of Commerce study concluded that one of the causes of the current insurance crisis is "[i]ncreasing awards for . . . punitive damages" DOC, PROD. LIAB. INS. STUDY, *supra* note 176, at 14.

276. The McNulty rule prohibiting the insurance coverage of punitive damages is generally said to except situations in which punitive damages are imposed vicariously upon a defendant. See, e.g., *Commercial Union Ins. Co. v. Reichard*, 404 F.2d 868 (5th Cir. 1968); *Schwab v. First Appalachian Ins. Co.*, 58 F.R.D. 615 (S.D. Fla. 1973); *Travelers Ins. Co. v. Wilson*, 261 S.2d 545, 549 (Fla. Ct. App. 1972); *Scott v. Instant Parking, Inc.*, 105 Ill. App. 2d 133, 245 N.E.2d 124 (1969). There are only a few decisions on point, however, and the commentators have generally accepted the proposition uncritically. See, e.g., D. DOBBS, *supra* note 16, at 216; W. PROSSER, *supra* note 31, at 13; Gonsoulin, *supra* note 260, at 436-37; Long, *Insurance Protection Against Punitive Damages*, 32 TENN. L. REV. 573, 577 (1965). The courts that developed the exception borrowed the reasoning of the punitive damages cases espousing the narrow "complicity" rule. See, e.g., *Northwestern Natl. Cas.*

C. *Measurement and Control of Punitive Damages Assessments*

The third major complication in the use of punitive damages in products liability litigation is in its administration. There are considerable difficulties in measuring and controlling punitive damages awards in all tort cases, but products liability litigation adds a particularly high risk that excessive verdicts will be levied against defendant manufacturers. A jury in one recent products liability case, for example, rendered a punitive damages assessment against the manufacturer of \$17,250,000.²⁷⁷ Multiple lawsuits compound the problem. For example, more than five hundred separate actions, seeking punitive damages totaling more than \$200 million, have been filed against A. H. Robins Company for its marketing of the Dalkon Shield.²⁷⁸ When the stakes are this high, tools for measuring and controlling such awards must be chosen and refined with great care.

1. *Measurement*

Punitive damages have been repeatedly attacked over the years on the ground that the standards used to measure them are exces-

Co. v. McNulty, 307 F.2d 432, 440 n.16 (5th Cir. 1962), *relying in part upon* Lake Shore & Mich. So. Ry. v. Prentice, 147 U.S. 101 (1893). Just as the complicity rule was seen to subvert the objectives of punitive damages in the general context of enterprise responsibility, *see* text at notes 205-38 *supra*, so does the application of its reasoning to the issue of insurance coverage of punitive damages do violence to the goals of punishment and deterrence. Courts would do well, therefore, to prohibit insurance coverage of punitive damages in products liability litigation regardless of the vicarious nature of the liability.

Nevertheless, even if courts should refuse to invalidate punitive damages insurance contracts in product liability cases, punitive damages should still be imposed. While insurance will reduce the punitive and deterrent effects of punitive damages, these goals will still be realized to some degree. *See* text at notes 251-58 *supra*. First, the insured manufacturer will eventually feel the effects of a punitive damages verdict to the extent that loss experience is reflected in future insurance rates. *See* note 252 *supra*. Secondly, a manufacturer publicly punished for marketing an excessively dangerous product will suffer a loss of reputation in excess of the amount normally resulting from a plaintiff's verdict in a products liability suit. *See* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 841 (2d Cir. 1967). Finally, and perhaps most importantly, the publicity given to a punitive damages verdict will alert the legal community to the clear defectiveness of the particular product and to a fertile source of information on both the product's defectiveness and the manufacturer's reckless conduct. More actions will then be brought and tried against the manufacturer, whose total punishment will be multiplied by the number of resulting settlements and plaintiffs' verdicts.

277. Pease v. Beech Aircraft Corp., 38 Cal. App. 2d 450, 133 Cal. Rptr. 416 (1974).

278. Wall St. J., Feb. 19, 1976, at 6, col. 2 (midwest ed.); *see* notes 395-96 *infra* and accompanying text. Punitive damages claims totaling "hundreds of millions" of dollars were similarly made against the defendant in the MER/29 litigation. Rheingold, *supra* note 127, at 135; *see* text at notes 336-51 *infra*.

sively vague.²⁷⁹ The trier of fact is generally instructed to determine a proper amount for such damages upon a consideration of "the character of the defendant's act, the nature and extent of the harm to the plaintiff which the defendant caused or intended to cause, and the wealth of the defendant."²⁸⁰ These standards are indeed general and vague, but the trier of fact is also informed of the principal purposes for which punitive damages are assessed—to punish the offender and to deter him and others from similarly misbehaving in the future. While this knowledge of the objectives of punitive damages does little to assure certainty of measurement, it does at least give some direction and purpose to the deliberations of the fact-finder. Yet direction and purpose are not enough; with the potential liability as high as it is, further guidelines must be developed to improve the accuracy of measurement and to check the potential for abuse.

A means of improving the accuracy and fairness of punitive damages awards is to consider the relevance of the goals of punishment, deterrence, law enforcement, and compensation to the facts of any particular case. The difficulty of determining the appropriate amount for such awards springs largely from the difficulty of determining a proper sum to achieve optimally each of these varied objectives. Thus, a consideration of the punitive damages functions in the products liability context can aid in the measurement of fair and accurate punitive damages awards.

Our analysis begins in inverted fashion with a consideration of the goal of compensation. This approach is inverted because the compensation function has traditionally been viewed as the tag-along little brother of the "primary" functions of punishment and deterrence.²⁸¹ However, as discussed earlier,²⁸² compensation should be considered a central goal. Once it has been established that a defendant's misconduct was sufficiently flagrant to warrant punitive damages liability, the plaintiff should at the very least be reimbursed for his costs of litigation. This then should generally represent the minimum award.²⁸³ In many cases involving serious injury, a punitive damages award equal to the plaintiff's compensatory damages

279. See C. McCORMICK, *supra* note 16, at 296; Morris, 44 HARV. L. REV. 1173, *supra* note 16, at 1189.

280. RESTATEMENT (SECOND) OF TORTS § 908(2) (Tent. Draft No. 19, 1973).

281. Cf. Note, 41 N.Y.U. L. REV. 1158, *supra* note 16, at 1162-63. But cf. notes 112, 152 *supra*.

282. See text at notes 185-202 *supra*.

283. See *Jolley v. Puregro Co.*, 94 Idaho 702, 710, 496 P.2d 939, 947 (1972); *Cox v. Stolworthy*, 94 Idaho 683, 691-92, 496 P.2d 682, 690-91 (1972).

would at least roughly cover the depletion of the plaintiff's judgment from litigation expenses and other noncompensable losses. The starting point for the measurement process then, without regard to the other functions, should be to make the plaintiff truly whole.²⁸⁴

The accurate measurement of punitive damages can also be promoted by examining the effects of awards of particular amounts on the related goals of deterrence and law enforcement. Thus, if the plaintiff's injuries are relatively mild, he should be awarded a sufficient sum in addition to litigation expenses to encourage him to sue.²⁸⁵ Moreover, as the magnitude of the hazard to the public increases, so too does the need to deter such behavior and therefore the need to increase the penalty.²⁸⁶ In addition, and more importantly in most products liability cases, punitive damages should be used to attack directly the profit incentive that generated the marketing misconduct. The award should not only extract the profit realized from the particular sale in question, but also the profits from all other sales of the product in its dangerous condition. Further, the manufacturer's probability of avoiding liability altogether should be factored in as well. Thus, the profits from the misconduct should be multiplied several times to optimize the deterrent effect.

Of course any specific evidence bearing on whether the particular defendant or other manufacturers might repeat the misbehavior should be carefully considered. If, for example, the defendant can demonstrate that it voluntarily terminated the misbehavior, especially if the termination occurred prior to the litigation, the need for specific deterrence would be correspondingly diminished.²⁸⁷ Measures such as disciplining or discharging employees responsible for the miscon-

284. See text at notes 185-203 *supra*.

285. See also text at notes 154-57 & note 158 *supra*.

286. See note 150 *supra* and accompanying text. The primary consideration will be the magnitude of the risk, and to a lesser extent the amount of harm, to which the public at large was exposed by the behavior, rather than the extent of harm to the particular plaintiff. See notes 291, 530 *infra* and accompanying text. *But see* Thomas v. American Cystoscope Makers, Inc., 414 F. Supp. 255, 264 (E.D. Pa. 1976); Hoffman v. Sterling Drug, Inc., 374 F. Supp. 850, 856-57 (M.D. Pa. 1974). In *Hoffman*, the plaintiff sought to argue to the jury that the amount of punitive damages assessed against the defendant should reflect the defendant's wrong to the public at large. 374 F. Supp. at 856. The court disagreed: "Applying the plaintiff's rationale, each injured consumer of Aralen, using identical evidence regarding testing, notice, etc., could individually recover on behalf of society to punish the affront. Such a result would be ludicrous. Instead, we view the law to be that each Aralen consumer showing a bona fide injury may, if the evidence warrants, collect his reasonable proportion of the punitive damages the defendant owes 'society.'" 374 F. Supp. at 856.

287. This is particularly true if the voluntary termination was accomplished by new management immediately after discovery of the misconduct. See, e.g., Drayton v. Jiffie Chem. Corp., 395 F. Supp. 1081, 1098 (N.D. Ohio 1975).

duct²⁸⁸ and substantially improving the relevant operating procedures might also demonstrate a reformed attitude that would similarly reduce the need for specific deterrence. Recalcitrance and cover-up by the manufacturer, on the other hand, either prior to or during the litigation,²⁸⁹ would indicate an excessive concern with profits and reputation²⁹⁰ at the expense of the public safety. In the latter case, the deterrent and law enforcement functions of punitive damages require that assessments be tailored to teach the lesson soundly that knowingly or recklessly marketing defective products will not pay.

The punishment function is the final factor to be considered in developing a standard for the measurement of punitive damages. The defendant manufacturer's attitude toward consumer safety is again important but in this context what is crucial is its scienter at the time of the misconduct. A manufacturer's punishment should correspond to its degree of awareness both of the presence of an excessive risk in its product and of the seriousness of the risk of injury presented. Thus, the more certain the manufacturer that its product was excessively hazardous, and the more dangerous the particular hazard of which it was aware,²⁹¹ the more serious its misconduct and the more severe should be its punishment. Also bearing on the seriousness of the offense and hence on the amount of punishment needed are the number and level of employees whose action or conscious inaction contributed to the marketing misconduct or its cover-up.²⁹²

288. Cf. note 211 *supra*.

289. See note 478 *infra* and accompanying text. Cf. *United States v. General Motors Corp.*, 385 F. Supp. 598, 602-03 (D.D.C. 1974), *revd. on other grounds*, 518 F.2d 420 (D.C. Cir. 1975).

290. See note 478 *infra* and accompanying text.

291. The amount of harm actually caused the plaintiff as a result of the defendant's misconduct has some minor relevance to the determination of the amount of punitive damages properly to be assessed in a given case "by analogy to the doctrine of the criminal law by which the seriousness of a crime may depend upon the harm done" RESTATEMENT (SECOND) OF TORTS § 908, comment *e* at 82 (Tent. Draft No. 19, 1973). However, the more relevant considerations are the magnitude of the risk of harm to the public created by the misbehavior and the extent of the defendant's awareness that the misbehavior might generate such a risk. See *Morris*, 44 HARV. L. REV. 1173, *supra* note 16, at 1181; notes 286 *supra*, 530 *infra* and accompanying text.

Many jurisdictions purport to limit punitive damages assessments by a "ratio rule" that requires such awards to bear a reasonable relation to the actual damages awarded in the case. See, e.g., *Hoffman v. Sterling Drug, Inc.*, 374 F. Supp. 850, 856-57 (M.D. Pa. 1974); *Morris*, 44 HARV. L. REV. 1173, *supra* note 16, at 1180. The rule is a poor one since it ties the measure of punitive damages to a factor that is usually unrelated to the primary reasons such damages are assessed against the defendant. See *id.* at 1180-81; Note, 41 N.Y.U. L. REV. 1158, *supra* note 16, at 1170-71.

292. Thus the level of the guilty employees within the corporate hierarchy will properly bear upon the amount of punitive damages to assess while not upon the prior determination of whether such damages should be awarded at all. See note 238 *supra* and accompanying text.

Furthermore, since the number of consumers potentially harmed by a defect increases with time, a manufacturer's culpability and the need for greater punishment commensurately increase as it fails to remedy the problem.²⁹³

The penalty ordinarily should not only match the misconduct²⁹⁴ but also should be tailored to the wealth of the particular defendant to optimize punishment and deterrence:²⁹⁵ "The theory is that a penalty which would be sufficient to reform a poor man is likely to make little impression on a rich one; and therefore the richer the defendant is the larger the punitive damages award should be."²⁹⁶ The financial condition of a manufacturer thus should be ascertained

293. *Cf. United States v. General Motors Corp.*, 385 F. Supp. 598, 603 (D.D.C. 1974), *rev'd on other grounds*, 518 F.2d 420 (D.C. Cir. 1975).

294. *See* notes 113, 193 *supra*.

295. This principle is rooted in logic and justice and is accepted by most courts today. *See, e.g., Herman v. Hess Oil Virgin Islands Corp.*, 524 F.2d 767, 772 (3d Cir. 1975); *Vollert v. Summa Corp.*, 389 F. Supp. 1348 (D. Hawaii 1975); RESTATEMENT (SECOND) OF TORTS § 908(2) & comment *e* (Tent. Draft No. 19, 1973). In the National Traffic and Motor Vehicle Safety Act of 1966, Congress made the following provision concerning civil penalties assessed under the Act: "In determining the amount of such penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered . . ." U.S.C. § 1398(b) (1970). However, the rule has been criticized. *See Hoffman v. Sterling Drug, Inc.*, 374 F. Supp. 850, 856-57 (M.D. Pa. 1974) ("The plaintiff . . . wishes to admit into evidence the defendants' net worth. Accounting problems aside, such a gratuitous gesture by the court would be immaterial in a unique case such as this and would mislead the jury"); *Morris*, 44 HARV. L. REV. 1173, *supra* note 16, at 1191; note 305 *infra* and accompanying text; *cf. Cox v. Stolworthy*, 94 Idaho 683, 690-91, 496 P.2d 682, 689-90 (1972).

In the case of a corporation, wealth has generally been considered provable by a showing of the institution's net worth. *See, e.g., Richards Co. v. Harrison*, 262 S.2d 258, 264 (Fla. Dist. Ct. App. 1972); *Nevada Cement Co. v. Lemler*, 89 Nev. 447, 453, 514 P.2d 1180, 1183 (1973). Other financial data have also been accepted as relevant to the determination of wealth. *See, e.g., Vollert v. Summa Corp.*, 389 F. Supp. 1348, 1352 (D. Hawaii 1975) (authorized or stated capital; net worth; gross income; and net income); *Herman v. Hess Oil V.I. Corp.*, 379 F. Supp. 1268, 1277 (D. St. Croix), *aff'd.*, 524 F.2d 767 (3d Cir. 1975) (net worth and net income; balance sheet and income statement both admitted into evidence); *Wisner v. S.S. Kresge*, 465 S.W.2d 666, 670 (Mo. App. 1971) (gross sales, net income, and net worth); *Parrott v. Bank of America Natl. Trust & Sav. Assn.*, 97 Cal. App. 2d 14, 25, 217 P.2d 89, 96 (1950) (capital surplus and undivided profits).

Any information concerning the manufacturer's financial affairs that bears on the effect a punitive damages award will have on the company's financial standing should logically be admissible, *see Jones v. Fisher*, 42 Wis. 2d 209, 219-20, 166 N.W. 2d 175, 181 (1969), and discoverable, *see Vollert v. Summa Corp.*, 389 F. Supp. 1348, 1352 (D. Hawaii 1975); *Holliman v. Redman Dev. Corp.*, 61 F.R.D. 488 (D.S.C. 1973); *Coy v. Superior Ct.*, 58 Cal. 2d 210, 222-24, 373 P.2d 457, 463-64, 23 Cal. Rptr. 393, 399-400 (1962). While such evidence may thus be discovered and introduced into evidence, the plaintiff may not have the burden of producing it. *See, e.g., Tri-Tron Intl. v. Velto*, 525 F.2d 432, 438 (9th Cir. 1975); *Rogers v. Florence Printing Co.*, 233 S.C. 567, 575-76, 106 S.E.2d 258, 262 (1958).

296. *Morris*, 44 HARV. L. REV. 1173, *supra* note 16, at 1191; *see Richards Co. v. Harrison*, 262 S.2d 258, 263-64 (Fla. Dist. Ct. App. 1972).

together with the probable impact thereon of a proposed punitive damages assessment.²⁹⁷

Finally, the punitive damages assessment should reflect other "punishment" already imposed, or likely to be imposed, upon the manufacturer as a result of its marketing misconduct. This other punishment includes compensatory damages awards to the plaintiff and other injured consumers,²⁹⁸ punitive damages awarded to other plaintiffs, and any criminal penalties.²⁹⁹

In summary, proper measurement of a punitive damages award in a products liability case should be furthered by careful consideration of the following factors:

- (1) the amount of the plaintiff's litigation expenses;
- (2) the seriousness of the hazard to the public;
- (3) the profitability of the marketing misconduct (increased by an appropriate multiple);
- (4) the attitude and conduct of the enterprise upon discovery of the misconduct;
- (5) the degree of the manufacturer's awareness of the hazard and of its excessiveness;
- (6) the number and level of employees involved in causing or covering up the marketing misconduct;
- (7) the duration of both the improper marketing behavior and its cover-up;
- (8) the financial condition of the enterprise and the probable effect thereon of a particular judgment; and
- (9) the total punishment the enterprise will probably receive from other sources.

Precise measurement of a punitive damages award will never be possible because of the general nature of the several goals it serves. Yet the careful use of these factors in products liability cases should help considerably to reduce the risk of capriciously determined awards and to assure that awards are more consistent with their underlying objectives.

2. Control

While the factors developed above should assist a conscientious judge or jury in determining the proper punitive damages assessment

297. See, e.g., *Vollert v. Summa Corp.*, 389 F. Supp. 1348 (D. Hawaii 1975).

298. See *Morris*, 44 HARV. L. REV. 1173, *supra* note 16, at 1188.

299. See *Ostopowitz v. William S. Merrell Co.*, N.Y.L.J. Jan. 11, 1967, at 21, col. 3 (Sup. Ct. Westchester County, N.Y.); RESTATEMENT (SECOND) OF TORTS § 908 comment *e* (Tent. Draft No. 19, 1973). See also *Morris*, 44 HARV. L. REV. 1173, *supra* note 16, at 1187-88, 1195-98.

in any particular case, the factors themselves cannot prevent occasional abuses in the form of excessively large verdicts. Particularly in "mass disaster" cases such as the MER/29 litigation in the 1960's³⁰⁰ and the Dalkon Shield litigation now in progress,³⁰¹ there is a significant risk that a manufacturer will be severely over-punished by scores or even hundreds of judgments for both compensatory and punitive damages. Indeed, it was within this very context that Judge Friendly offered his celebrated critique of punitive damages awards in products liability litigation.³⁰²

a. *Judicial control over excessive awards.* The best protection against excessive punitive damages awards would probably be to shift the responsibility for their measurement from the jury to the trial judge once the jury has determined that such damages should be assessed.³⁰³ This scheme offers several advantages over the traditional method of allowing the jury to determine such awards. First, it would reduce the probability that punitive damages awards might be unduly influenced by emotion, since most judges are presumably more detached in their deliberation and therefore more likely to render objective damages assessments.³⁰⁴ Additionally, evidence of the defendant's wealth that could prejudice the jury on the issue of liability³⁰⁵ could then be excluded from jury consideration. Further, judges would be able to call upon their experience in criminal sentencing, unavailable to jurors, in evaluating the need for punishment

300. See text at notes 336-51 *infra*.

301. See text at note 278 *supra* & notes 395-96 *infra*.

302. Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967).

303. See DuBois, *supra* note 9, at 352-53; cf. Morris, 44 HARV. L. REV. 1173, *supra* note 16, at 1179-80.

304. See DuBois, *supra* note 9. An overlooked twist of irony exists within the law of punitive damages. According to traditional learning, the jury cannot award such damages unless it concludes that the defendant's conduct was "outrageous." See RESTATEMENT (SECOND) OF TORTS § 908 (2) (Tent. Draft No. 19, 1973). But outrage is undoubtedly an emotion of passion and, therefore, if the jury is outraged by the defendant's conduct the verdict will have to be reversed as the product of passion. See, e.g., C. MCCORMICK, *supra* note 16, at 296. Thus the basis for punitive damages comes perilously close to being the basis for their reversal as well.

305. See Silliman, *supra* note 9, at 92; DuBois, *supra* note 9, at 351 ("There is usually great disparity between the parties' financial status which can create a Robin-Hood-like state of mind in the jury room"). But see Thomas v. American Cystoscope Makers, Inc., 414 F. Supp. 255, 268 (E.D. Pa. 1976) ("Properly limited instructions . . . we think eliminate the potential for prejudice"); Barth v. B.F. Goodrich Tire Co., 265 Cal. App. 2d 228, 241, 71 Cal. Rptr. 306, 313 (1968) ("It is doubtful whether the admission of evidence of Goodrich's financial condition . . . affected the judgment in this case since Goodrich is universally recognized as a large and prosperous corporation").

and deterrence in particular cases.³⁰⁶ Finally, trial judges usually have a more sophisticated appreciation than jurors of the often far-reaching effects that punitive damages awards may have on the operations of particular corporate defendants.

Yet even if the responsibility for measurement remains with the jury, both trial and appellate judges can exercise considerable control over excessive punitive damages verdicts. In the past, judges were most reluctant to tamper with punitive damages awards that, by their nature, are supposed to reflect the jury's communal outrage over the defendant's misbehavior.³⁰⁷ But those were the days when punitive damages verdicts of more than a few hundred dollars were rare, when verdicts of thirty or forty thousand dollars were "startlingly large,"³⁰⁸ and when multi-million dollar verdicts were simply unthinkable. Today, judicial control has tightened in many jurisdictions, and verdicts for punitive damages are generally being scrutinized at least as closely as verdicts for compensatory damages.³⁰⁹ Generally, a trial judge can attempt to reduce excessive awards by requiring the plaintiff to choose between remitting the objectionable portion of the verdict or submitting to a new trial,³¹⁰ which may be limited solely to the issue of damages. Similarly, an appellate court faced with a clearly excessive verdict can order remittitur or a new trial.³¹¹ Despite the limited number of products liability cases to date in which juries have awarded punitive damages, there are already solid indications that at least the trial bench will closely scrutinize such awards.³¹²

306. See Note, 41 N.Y.U. L. REV. 1158, *supra* note 16, 1171; Note, 70 HARV. L. REV., *supra* note 16, at 530.

307. See Note, 70 HARV. L. REV. 517, *supra* note 16, at 530.

308. C. MCCORMICK, *supra* note 16, at 298.

309. See, e.g., *Jolley v. Puregro Co.*, 94 Idaho 702, 496 P.2d 939 (1972). This change in attitude concerning the proper scope of review of punitive damages is reflected in the differences between the first and second torts *Restatements*. See RESTATEMENT (SECOND) OF TORTS § 908, comment *d* at 81-82 (Tent. Draft No. 19, 1973).

310. See, e.g., *Herman v. Hess Oil V.I. Corp.*, 379 F. Supp. 1268 (D. St. Croix), *affd.*, 524 F.2d 767 (3d Cir. 1975); *Caspersen v. Webber*, 298 Minn. 93, 100, 213 N.W.2d 327, 331 (1973) ("Even in the absence of passion or prejudice, the trial court should not hesitate to adjust a verdict where it is felt that the evidence does not justify the amount").

311. See, e.g., *Cox v. Stolworthy*, 94 Idaho 683, 496 P.2d 682 (1972); *Jones v. Fisher*, 42 Wis. 2d 209, 166 N.W.2d 175 (1969); cf. *Lanfranconi v. Tidewater Oil Co.*, 376 F.2d 91 (2d Cir. 1967).

312. See *Pease v. Beech Aircraft Corp.*, 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (1974) (affirming trial court's order granting new trial on \$17,250,000 punitive damages verdict); *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967) (affirming trial court's remittitur of punitive damages award from \$500,000 to \$250,000); *Rosendin v. Avco Lycoming Div.*, No. 202,715 (Super. Ct.

Although punitive damages verdicts should be closely scrutinized, a court must exercise its discretion with particular care and disturb such awards only upon clear evidence that the verdict as a whole is excessive. Careful use of judicial discretion is important because juries not infrequently include some or all of the plaintiff's general compensatory damages in the punitive damages award.³¹³ Thus, reversal or excessive remittitur may improperly reduce the composite award intended by the jury to compensate the plaintiff for his actual injury.

c. *b. Control over total punishment in mass disaster litigation.* One of the most troublesome aspects of punitive damages awards in products liability litigation is their potential not only to punish an offending enterprise but also to damage its finances severely or even to bankrupt it.³¹⁴ If a product is dangerously defective because of inadequate warnings or design, or because of a recurring flaw in manufacture, hundreds or thousands of similar injuries may result from the single defect in the product line. Such a result would be a "mass disaster" for both the consuming public and the manufacturer. In such situations, defendant manufacturers may be overwhelmed by the resulting liability for compensatory damages alone; massive additional awards of punitive damages to each plaintiff³¹⁵ may virtually ensure the manufacturer's bankruptcy. If the purpose of punitive damages is to punish a defendant and not to bankrupt him, to sting

Santa Clara County, Cal., March 8, 1972) (unpublished opinion, June 7, 1972), *affd.*, No. 32,999, Cal. App., 1st Dist., Feb. 24, 1976, *cert. denied*, Sup. Ct. Cal. (1976) (motion for new trial granted on punitive damages verdict of \$10.5 million in an unpublished opinion, June 7, 1972); *Ostopowitz v. William S. Merrell Co.*, N.Y.L.J. Jan. 11, 1967, at 21, col. 3 (Sup. Ct. Westchester County, N.Y.) (\$850,000 punitive damages verdict remitted to \$100,000).

313. See note 203 *supra*. For example, in *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976), the trial court rendered a *j.n.o.v.* setting aside verdicts against the manufacturer of \$100,000 in punitive damages and \$50,000 in attorneys' fees, but left intact a compensatory damages verdict of \$125,000. Plaintiff had incurred out-of-pocket medical expenses to the date of trial amounting to \$128,000 and would require medical expenses including full-time nursing care for the remainder of her life, costing \$13,624 annually, 523 F.2d at 105. Since there was no real issue on liability in the case, at least for compensatory damages, it appears quite likely that the jury arrived at a total amount intended to compensate the plaintiff for her actual damages, past and future, and then divided this amount between the compensatory and punitive damages awards and perhaps the award for attorneys' fees as well. See 523 F.2d at 105 n.2.

314. See *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839-41 (2d Cir. 1967).

315. Moreover, the magnitude of the financial disaster for the manufacturer will be multiplied if its products liability insurance carrier denies liability upon finding that the manufacturer violated its obligation under the insurance contract to remedy known defects. See notes 258, 262 *supra*.

a wrongdoer but not to kill him,³¹⁶ and if the manufacturer indeed is punished by substantial liability for compensatory damages, are not the punitive and deterrent functions of punitive damages already satisfied and the *raison d'être* for punitive damages thereby extinguished?

While such reasoning may have superficial appeal, there are several reasons for awarding punitive damages anyway. The vital role played by such awards in augmenting the incomplete reparation of compensatory awards was discussed above.³¹⁷ Also discussed earlier was the fact that compensatory damages alone in cases of flagrant misbehavior inadequately satisfy the retributive needs of the injured consumer and society.³¹⁸

Furthermore, the conclusion that manufacturers will be sufficiently punished in every mass disaster case without the payment of punitive damages is subject to question. For instance, a manufacturer's liability for compensatory damages may be insured, and to this extent the punitive and deterrent effects of such verdicts will be at least partially avoided.³¹⁹ Even if the manufacturer's insurance is insufficient to cover all potential compensatory claims, it probably will never be required to pay the bulk of such claims anyway. This is most apt to be true when a defective product typically causes relatively slight injuries, because of the small number of such cases taken to lawyers in the first place, and because few of these can be economically pursued for compensatory damages alone.³²⁰ Even in situations where the injuries are usually serious, many potential claims against the manufacturer are settled for a fraction of their value, and many are never made at all.³²¹ These are the "forgotten plaintiffs" who are left without redress under a system that only permits compensatory damages. These are precisely the plaintiffs helped by punitive damages awards, for such awards make litigation of minor claims economical and, as the number of substantial recoveries are increasingly publicized, they help to inform both injured consumers of their rights and lawyers of the desirability of litigating such claims. Thus, even when many consumers are injured by a manufacturer's flagrant marketing mis-

316. See, e.g., *Hoy v. Poyner*, 305 S.2d 306 (Fla. Dist. Ct. App. 1974); *Nevada Cement Co. v. Lemler*, 89 Nev. 447, 452, 514 P.2d 1180, 1183 (1973); *Ostopowitz v. William S. Merrell Co.*, N.Y.L.J., Jan. 11, 1967, at 21, col. 3 (Super. Ct. Westchester County, N.Y.).

317. See text at notes 178-79, 185-203 *supra*.

318. See text at notes 113-28 *supra*.

319. See text at notes 239-76 *supra*.

320. See text at notes 148-51 & note 151 *supra*.

321. See text at notes 176-80, 202 & note 176 *supra*.

conduct, the manufacturer may escape just punishment if punitive damages are not allowed.

Even in mass disaster litigation, then, punitive damages may play a vital role. But the role must be carefully shaped to fit this context. The substantial risk of over-punishment in the mass disaster situation requires that punitive damages awards be measured and controlled with special care as litigation progresses.

It has been suggested that the ideal solution to the problem would be first to litigate all compensatory damages claims arising out of a mass disaster, thus fixing the manufacturer's liability in this regard, and then to measure and assess a single punitive damages award against the manufacturer for equitable distribution among the plaintiffs.³²² Apart from its obvious impracticability,³²³ such a plan rests upon two dubious premises.³²⁴ The first is that the defendant's coffers will quickly be depleted if both compensatory and punitive damages are awarded in initial litigation, leaving nothing with which to pay later compensatory claims.³²⁵ Yet a contrary conclusion can be drawn from the MER/29 litigation, the only mass disaster products liability litigation that has run its course.³²⁶ While some 1500 claims were filed against the manufacturer in that case, only eleven were tried to a jury verdict. Out of these, only seven were decided for the plaintiff, and only three of these included awards of punitive damages, one of which was reversed on appeal.³²⁷ No doubt many claims were settled out of court. Yet if this is an example of the most crushing punishment that will befall a manufacturer guilty of flagrant marketing misbehavior—and it is difficult to imagine a more extreme case of such misbehavior than that of Richardson-Merrell in marketing MER/29—then the threat of bank-

322. See *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 n.11 (2d Cir. 1967); cf. *Hoffman v. Sterling Drug, Inc.*, 374 F. Supp. 850, 856 (M.D. Pa. 1974).

323. See *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839-40 n.11 (2d Cir. 1967); cf. *de Haas v. Empire Petroleum Co.*, 435 F.2d 1223, 1231-32 (10th Cir. 1970).

324. See *Vollert v. Summa Corp.*, 389 F. Supp. 1348, 1351 (D. Hawaii 1975); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839-40 (2d Cir. 1967).

325. See, e.g., *Vollert v. Summa Corp.*, 389 F. Supp. 1348, 1351 (D. Hawaii 1975) ("It would appear most inequitable to foreclose effective monetary relief to some injured persons because extensive punitive damages were granted to those who happened to obtain judgments earlier").

326. There has been at least one products liability "mini-disaster" that has run its course, involving the drug Aralen marketed by Sterling Drug, Inc. See *Hoffman v. Sterling Drug, Inc.*, 374 F. Supp. 850, 857 (M.D. Pa. 1974); text at notes 446-51 *infra*.

327. See note 339 *infra*.

rupting a manufacturer with punitive damages awards in mass disaster litigation appears to be more theoretical than real.

The second questionable premise is the supposed unfairness of rewarding the initial plaintiffs to a greater extent than subsequent claimants.³²⁸ This conception ignores the enormous diligence, imagination, and financial outlay required of initial plaintiffs to uncover and to prove the flagrant misconduct of a product manufacturer.³²⁹ In fact, subsequent plaintiffs will often ride to favorable verdicts and settlements on the coattails of the firstcomers.

Thus, while courts must be especially vigilant to control the very real, but by no means certain, risk of excessive punishment in mass disaster cases, the initial plaintiffs in appropriate cases should receive punitive damages awards that reward their efforts. Plaintiffs following soon thereafter, whose successful prosecutions of punitive damages claims confirm the first award, should be permitted to recover enhanced punitive damages awards for similar reasons. Thereafter, however, punitive damages recoveries should probably be limited to reasonable costs of litigation. And once the bankruptcy of the defendant manufacturer appears to be a real and imminent possibility, punitive damages should no longer be available at all. This approach to controlling punitive damages awards in mass disaster litigation should appropriately balance the various objectives of punishing the guilty manufacturer, rewarding the initial claimants, protecting the latecomers, and minimizing the risk of bankruptcy for the defendant.

The risk that defendants may be excessively punished is very real. But so too is the need for the punitive damages remedy in certain products liability cases. And the risk of excessive punishment can be reduced to an acceptable level through responsible measurement and effective judicial control. On occasion, punitive damages awards will unfortunately over-punish a manufacturer. But the benefits that will result from the general use of such awards will greatly outweigh the total of all such occasional harms.

IV. DEVELOPING A STANDARD OF LIABILITY FOR THE RECKLESS MARKETING OF DEFECTIVE PRODUCTS

A. *Classification of Recurring Forms of Flagrant Misconduct of Product Manufacturers*

Sections II and III concluded that punitive damages can serve a

328. See *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 840 (2d Cir. 1967); cf. *Vollert v. Summa Corp.*, 389 F. Supp. 1348, 1351 (D. Hawaii 1975).

329. See note 179 *supra*.

useful purpose in products liability litigation despite recurring difficulties involving vicarious liability, liability insurance, and measurement and control. The necessary task that remains is to develop an analytical framework to assist in identifying cases in which the assessment of punitive damages is appropriate. The standard of punitive damages liability to be proposed will center on the extent to which the marketing conduct of a manufacturer exhibits a conscious or reckless indifference to the risk that its product may be excessively dangerous to consumers. The problems encountered in developing such a standard are considerable,³³⁰ and competing considerations frequently clash. For example, the standard must be defined broadly enough to permit flexibility in its application, yet with sufficient specificity to provide manufacturers with adequate notice of the type of conduct for which they will be subject to quasi-criminal punishment.³³¹ Indeed, adequate notice is essential if punitive damages awards are to be effective in deterring the marketing of excessively hazardous products.³³² Vague as it necessarily will be, a standard must first be developed and articulated that can be refined through subsequent judicial experience.

The first step in designing such a standard involves the identification and examination of the various recurring forms of marketing misbehavior that judges and juries have considered most deserving of punishment. Since there are only a few reported decisions considering punitive damages in the products liability context,³³³ and

330. The difficulty is similar to that encountered in developing a definition for the basis of liability for compensatory damages in strict tort for the sale of defective products, which includes such imprecise terms as "defective" and "unreasonably dangerous." See, e.g., Keeton, *supra* note 169, at 31; Montgomery & Owen, *supra* note 2; Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 833 (1973).

331. See note 103 *supra* and accompanying text. But see *Thomas v. American Cystoscope Makers, Inc.*, 414 F. Supp. 255, 265 (E.D. Pa. 1976), *appeal docketed*, No. 76-1830, 3d Cir., June 21, 1976 ("The allowance of punitive damages does not convert a civil action into a quasi-criminal proceeding").

332. See notes 132-35 *supra* and accompanying text.

333. The first reported products liability case involving punitive damages is apparently *Fleet v. Hollenkamp*, 52 Ky. 175, 13 B. Mon. 219 (1852), which involved the sale of an adulterated drug. The court upheld the trial court's charge on exemplary damages and affirmed a general verdict in favor of the plaintiff. Other reported decisions involving personal injury claims for punitive damages in a products liability context and in which either the trial or appellate court decided in favor of the plaintiff include the following: *Johnson v. Husky Indus., Inc.*, — F.2d — (6th Cir. 1976) (asphyxiation from fumes emitted by charcoal briquets that were inadequately labeled) (\$212,500 punitive damages verdict reversed, \$212,500 compensatory damages verdict affirmed); *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976) (reversing *j.n.o.v.* and ordering entry of judgment to plaintiff of \$100,000 for punitive damages and \$50,000 for attorneys' fees); *Ussery v. Federal Laboratories, Inc.*, [1973-1975 Transfer Binder] CCH PROD.

since some of these cases incompletely report the pertinent facts, the following analysis of marketing misbehavior will also draw on several

LIAB. RPTR. ¶ 7084 (4th Cir. 1973) (punitive damages award, remitted from \$425,000 to \$350,000 by trial court, vacated on other grounds without discussion of punitive damages award) (opinion withdrawn, order, filed March 31, 1975); Hoffman v. Sterling Drug, Inc., 485 F.2d 132 (3d Cir. 1973) (compensatory damages verdict affirmed and remanded for trial of punitive damages), *on remand*, 374 F. Supp. 850 (M.D. Pa. 1975) (plaintiff not entitled to argue magnitude of defendant's harm to society nor to present evidence of defendant's net worth) (settled after five weeks of retrial for \$600,000, \$163,000 in excess of original compensatory damages verdict. 18 AM. TRIAL LAWYERS ASSN. NEWS LETTER 120 (1975) [hereinafter A.T.L.A.N.L.]); Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967) (reversal of \$100,000 verdict for punitive damages); Vollert v. Summa Corp., 389 F. Supp. 1348 (D. Hawaii 1975) (despite assertions of confidentiality, defendant designer-manufacturer of helicopter that crashed ordered to answer interrogatories of financial worth relevant to punitive damages claim); Drake v. Wham-O Mfg. Co., 373 F. Supp. 608 (E.D. Wis. 1974) (denial of defendant's motion to dismiss punitive damages claim; settled for \$65,000); Sabich v. Outboard Marine Corp., 60 Cal. App. 3d 591, 131 Cal. Rptr. 703 (1976) (reversing \$1,254,000 punitive damages verdict and affirming \$600,000 compensatory damages verdict); G.D. Searle & Co. v. Superior Ct., 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975) (reversal of trial court's overruling of defendant's demurrer to punitive damages claim); Barth v. B.F. Goodrich Tire Co., 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968) (no verdict on punitive damages, but punitive damages charge held proper); Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967) (punitive damages award, remitted from \$500,000 to \$250,000 by trial court, affirmed); E.R. Squibb & Sons, Inc. v. Stickney, 274 S.2d 898 (Fla. Ct. App. 1973), *cert. denied*, 416 U.S. 961 (1974) (reversal of compensatory damages award of \$70,000 and of punitive damages award of \$500,000); Moore v. Jewel Tea Co., 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969), *affd.*, 46 Ill. 2d 288, 263 N.E.2d 103 (1970) (\$10,000 punitive damages award affirmed without discussion); Ostropowitz v. Richardson-Merrell, Inc., N.Y.L.J., Jan. 11, 1967, at 21, col. 3 (Sup. Ct. Westchester County, N.Y.) (\$850,000 punitive damages verdict remitted to \$100,000). See also Griswold v. The Lange Co., CCH PROD. LIAB. RPTR. ¶ 7634 at 14,685 (D. Colo. 1976) (motion to dismiss punitive damages claim under Colorado survival statute denied); Heil Co. v. Grant, 534 S.W.2d 916 (Tex. Civ. App. 1976) (punitive damages recoverable in, and "deadman's" statute inapplicable to, action under Texas constitution and wrongful death act).

Reported products liability decisions involving personal injuries that have discussed punitive damages, in which all rulings were against the plaintiff include: Kritser v. Beech Aircraft Corp., 479 F.2d 1089 (5th Cir. 1973) (affirming refusal of trial court to submit punitive damages issue to jury); Thomas v. American Cystoscope Makers, Inc., 414 F. Supp. 255 (E.D. Pa. 1976), *appeal docketed*, No. 76-1830, 3d Cir., June 21, 1976 (granting defendant's motion for j.n.o.v. on plaintiff's \$200,000 punitive damages verdict); Drayton v. Jiffie Chem. Corp., 395 F. Supp. 1081, 1097-98 (N.D. Ohio 1975) (punitive damages claim disallowed in nonjury trial for insufficient evidence of "actual" malice); Pease v. Beech Aircraft Corp., 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (1974) (affirming trial court's order granting new trial on \$17,250,000 punitive damages verdict).

Reported products liability decisions involving personal injuries that have, without discussion, found the evidence insufficient to support a punitive damages award include the following: Ollier v. Lake Cent. Airlines, Inc. 423 F.2d 554 (6th Cir. 1970) (directed verdict for defendant on punitive damages claim affirmed); Crews v. Sikeston Coca-Cola Bottling Co., 240 Mo. App. 993, 995, 225 S.W.2d 812, 815 (1949) (trial court order granting new trial on punitive damages award of \$900 affirmed); Hafner v. Guerlain, Inc., 34 App. Div. 2d 162, 310 N.Y.S.2d 141 (Sup. Ct. 1970) (reversal of \$8,000 punitive damages verdict affirmed); Perry v. Kelford Coca-Cola Bottling Co., 196 N.C. 690, 146 S.E. 805 (1929) (reversal of punitive damages ver-

unreported cases³⁸⁴ and additional information gathered on reported cases.

dict). See *Oxman v. Hellene Pessl Inc.*, 279 F. Supp. 65 (S.D.N.Y. 1968) (punitive damages claim dismissed). Cf. *Commercial U. Ins. Co. v. Upjohn Co.*, 409 F. Supp. 453 (W.D. La. 1976) (punitive damages claim dismissed as unavailable under Louisiana law).

In addition, punitive damages awards have been held proper in a number of deceit actions based upon the fraudulent sale of "defective" products. These cases have involved property and economic losses rather than personal injuries. See, e.g., *Boehm v. Fox*, 473 F.2d 445 (10th Cir. 1973); *Standard Oil Co. v. Gunn*, 234 Ala. 598, 176 S. 332 (1937); *Boise Dodge, Inc. v. Clark*, 92 Idaho 902, 453 P.2d 551 (1969); *Johnson v. Allen*, 448 S.W.2d 265 (Mo. Ct. App. 1969); *Craig v. Spritzer Motors*, 109 Ohio App. 376, 160 N.E.2d 537 (1959). Cf. *Fritz v. Warner-Lambert Pharmaceutical Co.*, 349 F. Supp. 1250 (E.D.N.Y. 1972).

334. In the following unreported products liability cases, punitive damages claims have figured prominently: *Stonehocker v. General Motors Corp.*, Civil No. 74-462 (D.S.C., March 18, 1976), *appeal docketed*, No. 76-1920, 4th Cir., Aug. 24, 1976 (hand injuries from windshield broken by collapse of roof when automobile overturned; verdict for \$65,000 compensatory and \$250,000 punitive damages); *Wallace v. General Motors Corp.*, No. WPB-75-65-Civ-CF (S.D. Fla. 1975) (death caused by hood of automobile penetrating windshield and striking driver's neck in head-on collision; manufacturer failed to warn or correct despite knowledge of approximately 120 "instances of hood penetration through the windshield resulting in decapitation, paralysis, disfigurement, etc.") Letter from plaintiff's attorney, Edward M. Ricci, to David G. Owen, March 8, 1976; settled, after trial court denied defendant's motion to dismiss punitive damages claim for \$400,000, the amount of plaintiff's final settlement demand. "It is our firm belief that the punitive damages claim in the suit was a substantial factor leading to such a favorable settlement General Motors paid the full amount without any debate." Letter from Edward M. Ricci to David G. Owen, Dec. 16, 1975; *Engbreth v. Fairchild Hiller Corp.*, No. A-9-71 (D. Alas., filed Jan. 18, 1971) (deaths from plane crash caused by defective wing design and insufficient inspection process; settled for \$2,070,000 which included \$750,000-\$1,000,000 for "punitive damages question." Letter from plaintiff's attorney, Bernard P. Kelly, to David G. Owen, June 24, 1975; punitive damages claims allowed under survival statute and denied under wrongful death statute (unpublished opinion, Nov. 20, 1972)); *Scott v. Outboard Marine Corp.*, No. 71-1661 Civ JLK (S.D. Fla., filed Oct. 28, 1971) (one death and one loss of leg attributable to failure to warn or recall for repairs boat with defective steering; compensatory damages settlement after trial of \$250,000 for death and \$650,000 for loss of leg; verdict for defendant on punitive damages); *Schaller v. Sterling Drug, Inc.*, No. W-3792 (D. Kan., filed March 5, 1970) (visual impairment from use of Aralen, side effects of which had not been adequately warned of; settled during trial for \$315,000 after ruling that punitive damages issue would be submitted to jury); *Ornelas v. F.H. Langenkamp Co.*, No. 238260 (Super. Ct. Sacramento County, Cal., filed Aug. 28, 1973) (loss of leg attributable to failure of agricultural machine to have warning or safety devices as required by state regulations; settled immediately prior to trial for \$250,000); *Domich v. Jee's Juvenile Shop*, No. 225782 (Super. Ct. Sacramento County, Cal., filed Aug. 28, 1972) (burn injuries from flammable article of child's clothing; settled for \$458,000, *reported in* *Sacramento Bee*, Aug. 28, 1975, § B, at 2, col. 3); *Rosendin v. Avco Lycoming Div.*, No. 202715 (Super. Ct. Santa Clara County, Cal., March 8, 1972), *noted in* 15 A.T.L.A.N.L. 103 (1972) and 16 JURY VERDICTS WEEKLY 49 (Feb. 18, 1972) (deaths of four passengers and serious injuries to another from plane crash caused by defectively overhauled engine; motion for new trial granted on punitive damages verdict of \$10,500,000) (unpublished opinion, June 7, 1972, *affd.*, No. 32,999, Cal. App., 1st Dist., Feb. 24, 1976, *cert. denied*, Sup. Ct. Cal. (1976)); *Hayman v. Arcoa, Inc.*, Civil No. 70-3226 (20th Jud. Cir. St. Clair County, Ill., filed April 30, 1970) (injuries from accident caused by swaying of trailer attributable to inadequate hitch; verdict for \$225,000 compensatory damages

An analysis of these sources reveals five types of manufacturer misbehavior recurring with some frequency: (1) fraudulent-type misconduct; (2) knowing violations of safety standards; (3) inadequate testing and manufacturing procedures; (4) failures to warn of known dangers before marketing; and (5) post-marketing failures to remedy known dangers. Each form of misconduct will be considered in turn.

1. *Fraudulent-Type Misconduct*

Several products liability cases in which punitive damages were recovered have involved attempts by manufacturers to conceal known defects from consumers. While in some circumstances the mere failure to warn of a known danger could be regarded as fraudulent-type misconduct, the cases discussed in this section all involve *affirmative* conduct by a manufacturer designed to mislead the public. The phrase "fraudulent-type" is used to describe a form of conduct that is calculated to deceive yet may not be provable fraud in some jurisdictions because of the difficulties in establishing all the elements of the rather intricate common-law action of fraud and deceit.³³⁵

An appropriate starting point is an examination of a trio of

and \$5,000,000 punitive damages, settled—amount not disclosed); *Deemer v. A.H. Robins Co.*, No. C-26420 (Dist. Ct. Sedgwick County Kan., filed Oct. 1972, *appeal filed*, No. 48504, Kan. Sup. Ct., Aug. 23, 1976 (defectively designed IUD failed to prevent pregnancy and perforated uterine wall requiring surgical removal; verdict for \$10,000 compensatory and \$75,000 punitive damages); *Hawes v. General Motors Corp.*, No. 76 CP 1551 (C.P. Hampton County, S.C., filed March 12, 1976) (injuries in automobile accident from defective tie rod; denial of defendant's motion to strike punitive damages claim from strict tort cause of action) (unpublished Order, June 10, 1976); *Brown v. Pepsi-Cola Bottling Co.*, No. 13851 (C.P. Dorchester County, S.C., Nov. 26, 1974) (illness from ingesting contaminated beverage; jury reduced verdict from \$10,000 to \$3,500 when instructed that evidence was insufficient to support punitive damages verdict); *Smith v. Cessna Aircraft Co.*, No. 70-9255-L (193d Jud. Dist. Ct. Dallas County, Tex., Nov. 26, 1972), *noted in* 16 A.T.L.A.N.L. 30 (1970) (deaths and burn injuries to occupants of "uncrashworthy" private airplane; verdict for \$374,332, including punitive damages of \$180,000); *In re Stein*, File No. 463-718 (Milwaukee County Ct., Wis., Nov. 21, 1973) (failure to recall promptly contaminated intravenous fluid that caused death). *See also* *Stumpfenhorst v. Sterling Drug Co.*, No. Law 12207 (Cir. Ct. Arlington County, Va., June 16, 1970), *noted in* 13 A.T.L.A.N.L. 284-85 (1970) (visual impairment from ingestion of Aralen due to inadequate warning of side effects; \$175,000 settlement after trial judge allowed plaintiff to amend complaint during trial to include punitive damages claim).

335. In some jurisdictions, the plaintiff must establish as many as nine separate elements in order to recover upon an action brought in deceit, *see, e.g.*, *O'Shields v. Southern Foundation Mobil Homes, Inc.*, 262 S.C. 276, 204 S.E.2d 50 (1974), and a mass of technical rules and exceptions surrounds each of these elements, *see, e.g.*, *Toole v. Richardson-Merrell Inc.*, 251 Cal. App. 2d 689, 706-08, 60 Cal. Rptr. 398, 410-12 (1967). *See generally* 1 F. HARPER & F. JAMES, *supra* note 139, ch. 7.

MER/29 cases, *Toole v. Richardson-Merrell Inc.*,³³⁶ *Roginsky v. Richardson-Merrell, Inc.*³³⁷ and *Ostopowitz v. William S. Merrell Co.*³³⁸ These were among the more than 1500 actions brought against Richardson-Merrell for the manufacture and sale of the drug triparanol, marketed under the trade name MER/29, between April 1960 and April 1962.³³⁹ MER/29 was purported to reduce the level of blood cholesterol to aid in the treatment of arteriosclerosis and thus reduce the incidence of heart attacks and strokes. Regardless of whether the drug actually worked,³⁴⁰ it did in fact cause serious injury to thousands of persons.³⁴¹ The most serious of the drug's side effects was its propensity to cause cataracts, and by 1967 some 490 reported cases of this condition had been attributed to use of MER/29.³⁴²

Punitive damages were awarded by the juries in these three cases because Richardson-Merrell was shown to have acted in a manner calculated to deceive the Food and Drug Administration (FDA), the medical profession, and consumers concerning the safety of MER/29. The particularly hazardous nature of the drug must have been apparent to the defendant from the outset since in the first animal test of MER/29, conducted in 1957, all female rats given a high dosage of the drug died. Nevertheless, to obtain FDA approval of the drug and to improve its marketability within the medical profession, the director of the defendant's Biological Science

336. 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).

337. 378 F.2d 832 (2d Cir. 1967), *revg. in part* 254 F. Supp. 430 (S.D.N.Y. 1966).

338. N.Y.L.J., Jan. 11, 1967, at 21, col. 3 (Sup. Ct. Westchester County, N.Y.).

339. See Rheingold, *supra* note 127, at 121. Only 11 of the 1500 MER/29 claims resulted in jury verdicts, and 7 of the verdicts were rendered in favor of the plaintiffs in amounts ranging from \$20,000 to \$1.2 million. *Id.* at 133. The 3 cases of these 11 in which decisions were published discussing the punitive damages awards were *Toole*, *Roginsky* and *Ostopowitz*. The *Toole* jury awarded the plaintiff \$175,000 general damages and \$500,000 punitive damages. The trial judge remitted the punitive damages verdict to \$250,000, and the appellate court affirmed. 251 Cal. App. 2d at 717, 60 Cal. Rptr. at 418. The jury in *Roginsky* rendered a compensatory damages verdict of \$17,500 and punitive damages of \$100,000. 254 F. Supp. at 430. Judge Friendly, writing for the majority in a 2-1 decision of the Second Circuit, affirmed the compensatory damages award but reversed the award of punitive damages. 378 F.2d at 851. The *Ostopowitz* jury awarded \$350,000 in compensatory damages and \$850,000 in punitive damages to the injured party and \$5000 to her husband for loss of services. On a motion to set aside the verdict, the trial judge approved the compensatory damages verdict and ordered a reduction in the punitive damages award to \$100,000. N.Y.L.J., Jan. 11, 1967, at 21, cols. 3-4.

340. There was some doubt that it did. See 251 Cal. App. 2d at 694, 60 Cal. Rptr. at 403.

341. The trustee of the MER/29 litigation group, Paul D. Rheingold, estimates that the drug caused a minimum of 5000 injuries. Rheingold, *supra* note 127, at 121.

342. 251 Cal. App. 2d at 701, 60 Cal. Rptr. at 408.

Division ordered the falsification of data in a test conducted on monkeys in 1959 and actually fabricated data for a nonexistent monkey. In its July 1959 new drug application to the FDA, Richardson-Merrell included the falsified monkey data and other significant misrepresentations, including a claim that only four of eight rats had died in one study when in fact all eight had died. Even so, the FDA still concluded that the drug appeared to be excessively hazardous and insisted that the manufacturer run additional tests. Richardson-Merrell responded with further falsifications of prior tests to encourage the FDA to relax its conditions. In January and February of 1960 the defendant completed three additional animal tests on rats and dogs. Nine of ten rats in one test developed eye opacities, as did twenty-five of thirty-six in another, and one of the dogs went blind. All of this information was deleted from the reports submitted to the FDA. Based upon the false and misleading information in its possession, the agency granted the defendant approval to market the drug in April 1960.³⁴³

From the initial marketing until sales were terminated in 1962, evidence mounted rapidly that MER/29 could cause eye damage and other harm to both test animals and humans. Despite its knowledge of this increasing evidence of the drug's dangerous side effects, Richardson-Merrell continued to advertise its product as "a proven drug, remarkably free from side effects, virtually non-toxic . . . and completely safe,"³⁴⁴ and assured its salesman that "[t]here is no longer any valid question as to its safety or lack of significant side effects."³⁴⁵ Moreover, in response to inquiries from doctors concerned that MER/29 might be responsible for the hair loss or eye problems of their patients, the company falsely claimed to be unaware of such side effects or similar complaints.³⁴⁶ When urged in late 1961 by both the FDA and the British government to remove the drug from the market, the defendant stubbornly refused. It was only after the FDA seized all of the company's animal experiment records during an unannounced visit to Richardson-Merrell laboratories in April 1962 that the company finally suspended sales of the drug. Permission to market the drug was formally withdrawn by the FDA in May 1962 on the ground that it was unsafe for its intended use.³⁴⁷

343. 251 Cal. App. 2d at 695-97, 60 Cal. Rptr. at 404-05.

344. 251 Cal. App. 2d at 714, 60 Cal. Rptr. at 416.

345. 251 Cal. App. 2d at 699, 60 Cal. Rptr. at 406.

346. Rheingold, *supra* note 127, at 119.

347. 251 Cal. App. 2d at 700-01, 60 Cal. Rptr. at 408.

During the two years that it was on the market, MER/29 was administered to approximately 400,000 persons. Several thousand users suffered eye injuries, hair loss, and skin disorders, even though most of them had been taking the drug for less than three months. There was also evidence that most of the 400,000 users would have developed cataracts had they continued taking it.³⁴⁸

Had Richardson-Merrell been truthful with the FDA from the start, MER/29 might never have been marketed. However, this obviously dangerous and defective drug did reach the market and stay there long enough to do substantial harm because its manufacturer actively deceived the public. Undoubtedly Richardson-Merrell acted so irresponsibly because the drug promised to be especially profitable.³⁴⁹ The juries in *Toole*, *Roginsky* and *Ostopowitz* determined that this fraudulent-type behavior needed to be punished and discouraged and so awarded large verdicts of punitive damages,³⁵⁰ thus initiating the era of such awards in modern products liability litigation.³⁵¹

In *E. R. Squibb & Sons, Inc. v. Stickney*,³⁵² a drug company was again alleged to have engaged in fraudulent-type misconduct in order to market a product of potentially great profitability.³⁵³ The product in this case, "Boplant," a bone grafting material made of calf bone and marketed for use in humans, was used by an orthopedic surgeon in a grafting operation on the plaintiff's injured spine in 1966. The plaintiff's graft ultimately failed because of an antigen-antibody response to the implanted material that caused it to be encircled by fibrous membrane and "practically eaten away," thus necessitating its removal in 1969.³⁵⁴ Discouraged by many similar failures, the defendant had discontinued the sale of Boplant in 1966, shortly after the plaintiff's initial operation. A jury found the product defective and the defendant's related promotional activities fraudulent, and awarded the plaintiff \$70,000 in compensatory

348. 251 Cal. App. 2d at 701, 60 Cal. Rptr. at 408.

349. "In its first year at large it contributed \$7,000,000 to appellant's gross sales." 251 Cal. App. 2d at 701, 60 Cal. Rptr. at 408. "Vice President Woodward declared that MER/29 was ' . . . the biggest and most important drug in Merrell history. . . .'" 251 Cal. App. 2d at 700, 60 Cal. Rptr. at 407.

350. See Rheingold, *supra* note 127, at 132-34 n.46.

351. The only previous reported products liability case in which a punitive damages award had been upheld in a case involving personal injuries was *Fleet v. Hollenkemp*, 52 Ky. 175, 13 B. Mon. 219 (1852); see note 333 *supra*.

352. 274 S.2d 898 (Fla. Ct. App. 1973), *cert. denied*, 416 U.S. 961 (1974).

353. Plaintiff's counsel estimated the potential market at \$15 million per year. Appellee's Petition to Vacate Appellate Decision at 67 (1st Dist. Fla. Ct. App., filed Aug. 1974) [hereinafter Petition to Vacate].

354. 274 S.2d at 900.

damages and \$500,000 in punitive damages, upon which judgment was entered.³⁵⁵ The appellate court reversed, however, ruling that the product was not defective³⁵⁶ and that the defendant's conduct was neither fraudulent nor even grossly negligent.³⁵⁷

The plaintiff's evidence in *Stickney*³⁵⁸ revealed certain details of the defendant's conduct not mentioned in the appellate decision that help to account for and justify the jury's large punitive damages award. For example, Squibb had advertised to the medical community that "[n]o evidence of an immune response or inflammatory reaction was reported in any animal studies";³⁵⁹ that the product had experienced an eighty-five per cent success rate in a four-year clinical study involving 452 human operations;³⁶⁰ that there had been "no clinical evidence of foreign body reaction, sensitivity or an undesirable immunologic response in the entire 452 operations";³⁶¹ and that Boplant was as satisfactory as autogenous bone taken from other areas of a patient's body.³⁶² The plaintiff's evidence persuasively demonstrated, however, that these representations were based upon grossly manipulated test procedures and interpretations. For example, an experimenter for Squibb testified he had "rigged" the company's transplant studies on dogs so that "he would have gotten 'success' even if he had used nothing at all, or even if he used plaster of paris instead of Boplant."³⁶³ Further evidence contrary to Squibb's representations revealed that patients in many of the 452 operations studied experienced substantial adverse reactions to the implanted material,³⁶⁴ and that the results in only nineteen per cent of the operations justified claims that Boplant had been successfully grafted to the patient's bone.³⁶⁵

355. 274 S.2d at 900.

356. 274 S.2d at 906-07.

357. 274 S.2d at 907.

358. The representations concerning the plaintiff's evidence are based upon the Petition to Vacate. The facts in this case and in many of the cases that follow are stated as they have been represented by plaintiff's counsel, either in pleadings and briefs filed with a court or in letters sent and questionnaires returned to the author.

359. Petition to Vacate at 7.

360. *Id.* at 8-9. However, the court refers to a clinical success rate in excess of 90 per cent in a study involving 400 patients. 274 S.2d at 901.

361. Petition to Vacate at 9.

362. 274 S.2d at 906. The defendant also represented in both the Physician's Desk Reference and the drug data package insert that "no sensitization reactions have been reported in its use." Petition to Vacate at 40.

363. Petition to Vacate at 8.

364. Petition to Vacate at 37 (reactions including drop in blood pressure, shock, cardiac collapse, swelling at graft site and unexplained disappearance of graft itself).

365. *Id.*

Furthermore, after Squibb's initial study, independent research by the United States Navy Bone Bank, the Naval Medical Research Laboratories, and the Armed Forces Institute of Pathology concluded that "50% of the Boplant specimens demonstrated unacceptable reaction"³⁶⁶ In addition, a team of four orthopedic physicians from one medical school published a study indicating that Boplant was the least satisfactory of all nine substitute bone graft materials they had tested, that failures were experienced in ninety per cent of the cases in which Boplant was used, and "that its performance approximated [that of] their controls where nothing was used in the empty bone gaps."³⁶⁷ The plaintiff further demonstrated that Squibb had been informed by a leading bone transplant specialist at the beginning of the Boplant project that its testing methods and criteria were unreliable.³⁶⁸ Finally, the plaintiff proved that by the time the product was removed from the market in 1966, Squibb had received more than 1000 complaints from physicians around the country.³⁶⁹ It was upon this evidence of manufactured animal test results and seriously misleading human test interpretations that the jury awarded punitive damages.

The MER/29 cases, *Stickney*, and other products liability cases involving fraudulent-type misconduct by manufacturers all reveal a particularly serious form of misbehavior: a conscious and active effort to conceal a product danger that the manufacturer knows presents a substantial risk of injury. Consumers are entitled to assume that they are not being intentionally deceived by manufacturers concerning the safety of their products. When a plaintiff can attribute his injury to a manufacturer's intentionally deceptive practices, an award of punitive damages is highly appropriate.

Institutional "fraud" of this type, however, will often be particularly difficult for a plaintiff to uncover and to prove.³⁷⁰ The jury must therefore be given considerable latitude in determining

366. *Id.* at 69.

367. *Id.* at 65-66. "In essence, Boplant was found by them to be worthless" *Id.* at 66.

368. *Id.* at 71.

369. *Id.* at 69. This evidence contradicted the finding in the appellate decision that Squibb received a total of approximately 150 complaints. See 274 S.2d at 902.

370. The difficulty in proving this type of institutional "fraud" is mitigated somewhat, however, by the fact that the manufacturer's conduct in such cases will often reflect in addition a reckless failure to test, redesign, warn, or recall. This type of misconduct will usually be easier to prove and may also support a punitive damages award. For example, prior to its fraudulent-type activities, Richardson-Merrell's initial misconduct concerning MER/29 was its failure to run additional tests to discover the nature and severity of the hazard once early tests had revealed adverse reactions produced by the drug.

whether a manufacturer's marketing conduct, when viewed as a whole, demonstrates a conscious attempt to conceal a product's dangers from consumers. Punitive damages have long been awarded in cases in which a defendant's fraudulent misbehavior has caused financial loss to the plaintiff.³⁷¹ Surely cases in which a manufacturer causes personal injury to consumers ought to be treated similarly.

2. *Knowing Violations of Safety Standards*

Thousands of standards prescribing minimally acceptable safety characteristics for many types of products have been issued by various legislatures, regulatory agencies and private organizations.³⁷² Sometimes a plaintiff is able to establish that he was injured by a product marketed in violation of such a standard and that his injury might have been averted had the standard been followed.³⁷³ If the plaintiff can further demonstrate that the manufacturer knew that its product failed to meet the requirements of a particular safety standard, yet marketed it anyway, an inference may be raised that the manufacturer acted in conscious disregard of the product's defective condition. In this way a manufacturer's knowing violation of a safety standard has figured prominently in several cases in which juries have assessed punitive damages verdicts.

One case involving a breach of a safety regulation promulgated by a federal agency is *Rosendin v. Avco Lycoming Div.*,³⁷⁴ a consoli-

371. See, e.g., *Standard Oil Co. v. Gunn*, 234 Ala. 598, 176 S. 332 (1937); *McAroy v. Wright*, 25 Ind. 22 (1865); *Walker v. Sheldon*, 10 N.Y.2d 401, 179 N.E.2d 497, 223 N.Y.S.2d 483 (1961).

372. The federal government and every state with the possible exception of Utah have statutes regulating product safety. See E. SCHWARTZ, *HAZARDOUS PRODUCTS LITIGATION* § 2:6 (1973); 1974 U.S. CONSUMER PRODUCT SAFETY COMMISSION ANN. REP. 53-56. Thousands of product safety standards have been promulgated by various federal agencies such as the Occupational Safety and Health Administration (OSHA), the National Highway Traffic Safety Administration (NHTSA), the Consumer Product Safety Commission (CPSC), the Food and Drug Administration (FDA), and the Federal Aviation Administration (FAA). Many product safety standards have also been issued under the authority of various state commissions. Private standards-making organizations, coordinated by the American National Standards Institute (ANSI), are responsible for many thousands of additional standards. See generally 1 L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 5.04 (1975); D. ROBB, H. PHILO & R. GOODMAN, *LAWYERS DESK REFERENCE—TECHNICAL SOURCES FOR CONDUCTING A PERSONAL INQUIRY ACTION* chs. 17 & 18 (5th ed. 1975); Philo, *Use of Safety Standards, Codes and Practices in Tort Litigation*, 41 NOTRE DAME LAW. 1 (1965); Note, *Products Liability Based upon Violation of Statutory Standards*, 64 MICH. L. REV. 1388 (1966).

373. See, e.g., *McComish v. DeSoy*, 42 N.J. 274, 200 A.2d 116 (1964).

374. No. 202,715 (Super. Ct. Santa Clara County, Cal., March 8, 1972), noted in 15 A.T.L.A.N.L. 103 (1972), and 16 JURY VERDICTS WEEKLY 49 (Feb. 18, 1972),

dated action for the deaths of four persons and injuries to a fifth caused by the crash of an executive jet due to engine failure in 1967. The airplane's engine was first manufactured by the defendant in 1957 and then "remanufactured" and resold by the defendant in 1960 and again in 1963. On each occasion that the "remanufactured" engine was resold it was ostensibly "zero timed"; the new owner was given a new warranty and a certificate stating that the engine complied with "all Federal Aviation Administration [FAA] regulations concerning zero timing engines."³⁷⁵ Strict federal regulations governed the quality of zero-timed engines represented to be "rebuilt"; apparently only the defendant called its reworked engines "remanufactured." Nevertheless, the defendant's service manager conceded that the 1963 resale violated existing FAA regulations because the company had "remanufactured" its engines with secondhand parts that met only the lower tolerances permitted by the FAA for "overhauled" engines rather than the safer tolerances required for genuinely "rebuilt" zero-timed engines. The testimony also indicated that the defendant had ignored the regulations governing "rebuilt" engines because it considered them too stringent and too expensive, and that it may even have used the term "remanufactured" to deceive purchasers that their engines had in fact been "rebuilt" while avoiding the more expensive reconditioning required by the FAA for engines so represented.³⁷⁶ Upon this evidence of an intentional breach of a regulatory safety standard, together with some evidence of a fraudulent-type effort to mislead consumers, the jury awarded substantial compensatory damages to each plaintiff and \$10.5 million in punitive damages to the sole survivor.³⁷⁷

affd., Civil No. 32,999, Cal. Ct. App., 1st App. Dist., June 23, 1976, *cert. denied*, Sup. Ct. Cal. (1976).

375. Brief for Plaintiffs at 11-13, *Rosendin v. Avco Lycoming Div.*, cited note 374 *supra*. "In effect, the certificate said that the engine had been remanufactured or rebuilt, that it could be treated as a zero-timed engine and could have a new record without previous operating history as provided in the [FAA] regulations." *Id.* at 13. Plaintiffs further argued that "owners and mechanics rely on these log book entries when an engine is rebuilt . . . and it is important whether an engine is zero-timed or whether it has a previous history." *Id.* at 14-15.

376. *Id.* at 10-12. "Lycoming adopted a semantics scheme to avoid compliance in a manner which constituted a fraud on the public." *Id.* at 5.

377. The jury awarded approximately \$2.8 million compensatory damages to the representatives of the pilot and three passengers killed in the crash and approximately \$1.1 million compensatory damages in addition to the punitive damages to the permanently disabled survivor. In an unpublished opinion dated June 7, 1972, the trial court denied the defendant's motions for judgment notwithstanding the verdict and for a new trial on compensatory damages but granted its motion for a new trial on punitive damages, ruling that the verdict was excessive and that the plaintiffs had failed to establish their reliance upon the defendant's fraudulent conduct. The

In other cases, manufacturers have admitted intentionally ignoring safety standards promulgated by private organizations. In one case brought against U-Haul Company and a related affiliate, the jury awarded \$5 million in punitive damages to the plaintiff who was injured when her U-Haul trailer swayed into another automobile.³⁷⁸ Contending that the accident was caused by the manufacturer's use of an inadequate trailer hitch, the plaintiff introduced evidence that the trailer's design precluded use with the hitch recommended for safe towing by the Society of Automotive Engineers (SAE) and the major automobile manufacturers.³⁷⁹ In defense, U-Haul asserted that it had intentionally disregarded the SAE recommendations because it did not agree with them.³⁸⁰ Similarly, in a case involving an automobile that crashed when a defective tire blew out,³⁸¹ General Motors representatives testified that their company had intentionally disregarded the maximum carrying capacity standards of the Tire and Rim Association because they considered the standards too stringent.³⁸²

Evidence demonstrating that a manufacturer knowingly marketed a product in violation of a safety standard is clearly pertinent to whether the factfinder should award punitive damages. However, whether such a defendant further ought to be liable for punitive damages as a matter of law is another question.³⁸³ There is substantial initial appeal to reasoning that an intentional violation of a product safety standard, especially one promulgated by a legislative body, that injures a consumer is ipso facto an intentional violation of the consumer's rights protected by the standard, and that therefore the manufacturer should automatically be liable for punitive damages. This reasoning is similar to that used to justify a strict application of the negligence per se rule in some jurisdictions.³⁸⁴ Furthermore, a "malice per se" rule for punitive damages is to some

decisions were affirmed on appeal. *Rosendin v. Avco Lycoming Div.*, cited note 374 *supra*.

378. *Hayman v. Arcoa, Inc.*, Civ. No. 70-3226 (20th Jud. Cir. St. Clair County, Ill., filed April 30, 1970).

379. Brief for Plaintiff at 20, *Hayman v. Arcoa, Inc.*, cited note 378 *supra*.

380. *Id.* at 11.

381. *Barth v. B.F. Goodrich Tire Co.*, 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968).

382. 261 Cal. App. 2d at 238, 71 Cal. Rptr. at 311.

383. A rule of punitive damages liability as a matter of law would conflict with the oft-repeated rule followed in most jurisdictions that punitive damages are always awarded in the jury's discretion and are never a matter of right. See note 26 *supra* and accompanying text.

384. See 2 F. HARPER & F. JAMES, *supra* note 139, at § 17.6; W. PROSSER, *supra* note 31, at § 36.

extent even more compelling than the negligence per se doctrine since liability for compensatory damages may result under the latter rule in a case in which the breach of the safety standard was not itself a negligent act,³⁸⁵ whereas liability for punitive damages under the malice per se test would result only on proof the manufacturer consciously or recklessly breached a product safety standard.

The analogy between the negligence per se rule and a malice per se rule weakens, however, upon closer analysis. Violation of a criminal safety statute is generally considered negligence as a matter of law because enactment of the statute, establishing both the standard of conduct and criminal penalties for its violation, is in most cases clear evidence that the community considers the proscribed conduct unreasonably dangerous to some class of persons. A defendant's breach of such a statute can thus be viewed as a violation of an important societal standard of responsibility that may fairly give rise to an obligation to compensate persons injured by the breach. That is, liability flows from proof of the defendant's breach of the statute; proof that the defendant acted negligently or with due care is thus unnecessary and irrelevant.³⁸⁶ Similarly, under the malice per se rule postulated above, proof that a manufacturer knowingly breached a safety statute would be determinative of its liability for punitive as well as compensatory damages. Yet a manufacturer's decision to violate a product safety standard may be far less culpable than a decision to expose consumers to an unreasonable risk of harm. A rule imposing strict liability for punitive damages thus would be palpably unfair, for a manufacturer should always be permitted to show that its actions were innocent or at most inadvertent.

In some cases, for example, the safety standard may be more stringent than is actually required for the public safety. Both U-Haul and General Motors made this argument in the cases discussed earlier.³⁸⁷ In other cases, a particular safety standard may be essentially worthless or may even create more hazards than it eliminates.³⁸⁸ Punishment, and perhaps deterrence as well, seems singularly inappropriate in these situations, especially if the standard was formulated by a private organization not authorized to act on the public's behalf. Moreover, in many such cases, punishment and deterrence are achieved anyway by judgments for compensatory damages for which manufacturers are generally strictly liable. Although the

385. See 2 F. HARPER & F. JAMES, *supra* note 139, § 17.6, at 999, 1008-09.

386. See *id.* at 1009-10. But see W. PROSSER, *supra* note 31, at 198-99.

387. See notes 378-82 *supra* and accompanying text.

388. Cf. W. PROSSER, *supra* note 31, at 200.

harshness of a malice per se rule could be tempered by allowing the defenses of justification or excuse, as in the context of negligence per se, the seriousness of imposing judicial punishment on a manufacturer in addition to compensatory damages suggests that a per se rule for punitive damages is inadvisable.³⁸⁹

Instead, a jury should be permitted to consider proof of an intentional breach of a safety standard as *evidence* that the manufacturer marketed the product in flagrant disregard of the rights or interests of consumers. A number of factors should be considered in determining the weight given to such evidence in particular cases: the authoritativeness and expertise of the body promulgating the standard; the clarity of the standard; the defendant's certainty that the product as marketed violated the standard; the nature of the danger the standard seeks to prevent; its apparent effectiveness in averting such dangers; the degree of increased danger resulting from its violation; the economic and practical feasibility of complying with the standard; and, finally, any possible benefits that may have accrued to consumers from its violation.

In *Rosendin*, for example, the breached federal standard was designed to control the quality of rebuilt aircraft engines and thus to prevent serious hazards to aircraft users. A breach of such a regulation for the purpose of increasing the profitability of the company's engine overhaul operations clearly is conduct deserving of a punitive damages award. On the other hand, whether a jury could reasonably conclude that the refusal of U-Haul and General Motors to adhere to privately established trailer hitch recommendations and maximum capacity standards demonstrated a conscious disregard of the public safety would depend upon a closer evaluation of all the evidence.

Proof that a manufacturer marketed a defective product knowing it to be violative of a product safety standard should always be highly relevant in determining whether the manufacturer acted in flagrant disregard of consumer safety. This approach is reasonable since the standard puts the manufacturer on notice that the particular product falls below a safety norm and thus may be excessively hazardous. If a defendant chooses to ignore this notice at the expense of the public safety, a punitive damages assessment may well be appropriate.

3. *Inadequate Testing or Quality Control*

When negligence was the predominant theory of liability for

389. See *id.* at 197-201.

defective products, injured plaintiffs frequently claimed that the manufacturer failed to conduct adequate tests or inspections.³⁹⁰ *MacPherson v. Buick Motor Co.*³⁹¹ firmly established a manufacturer's duty of ordinary care to consumers to search for and to remedy whatever unreasonable dangers might be hidden in its products. Ordinary care requires that the diligence of the search reflect the product's potential for harm.³⁹² The rationale behind such searches, of course, is that defects uncovered by tests and inspections will be remedied by the manufacturer prior to the marketing of the product so consumers will not be used as unsuspecting subjects for marketplace safety test programs.³⁹³

The formulation of strict products liability principles for compensatory damages, however, shifted the crucial determination from whether a manufacturer had diligently searched for concealed defects to whether the product itself was marketed in a defective condition.³⁹⁴ The analysis of punitive damages claims requires that attention be shifted back once again to the manufacturer's diligence in searching for defects in its products. The inquiry here is whether the manufacturer's testing and examination procedures were so inadequate as to manifest a flagrant indifference to the possibility that the product might expose consumers to unreasonable risks of harm.

In *Deemer v. A. H. Robins Co.*,³⁹⁵ for example, the jury awarded \$10,000 in compensatory damages and \$75,000 in punitive damages for injuries sustained when the defendant's intrauterine contraceptive device (IUD), the Dalkon Shield, both failed to prevent the

390. See generally RESTATEMENT (SECOND) OF TORTS § 395 (1965); 1 L. FRUMER & M. FRIEDMAN, *supra* note 372, at § 6.01; Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816 (1962).

391. 217 N.Y. 382, 111 N.E. 1050 (1916).

392. 217 N.Y. at 395, 111 N.E. at 1055. See RESTATEMENT (SECOND) OF TORTS § 395, Comment e (1965). See also RESTATEMENT (SECOND) OF TORTS § 388, Comment m (1965); 1 R. HURSH & H. BAILEY, *AMERICAN LAW OF PRODUCTS LIABILITY* § 2:14 (2d ed. 1974).

393. See *Dalehite v. United States*, 346 U.S. 15, 52 (1953) (Jackson, J., dissenting); text at note 422 *infra*; Morris, *Negligence in Tort Law—With Emphasis on Automobile Accidents and Unsound Products*, 53 VA. L. REV. 899, 909 (1967) ("Per-nicious products should be scrapped in the factory rather than dodged in the home").

394. But cf. *Montgomery & Owen*, *supra* note 2 at 808-09, 839.

395. No. C-26420 (Dist. Ct. Sedgwick County, Kan., filed Oct. 1972), *appeal filed*, No. 48,504, Kan. Sup. Ct., Aug. 23, 1976. This is the first action against A.H. Robins for the marketing of the Dalkon Shield to go to judgment. No doubt it will not be the last. As of February 1976, 547 such actions had been filed against the company. Wall St. J., Feb. 19, 1976, at 2, col. 3. The Dalkon Shield litigation is thus destined to become the next MER/29-type mass disaster products liability litigation.

plaintiff's pregnancy and perforated her uterine wall, thereby requiring the device's surgical removal. The complaint alleged inadequate testing and fraudulent promotion and advertising. Testimony before a congressional committee investigating the cause of the many injuries and deaths from IUD's revealed that A. H. Robins had marketed the Dalkon Shield after clinically testing the product for a "pathetic" average insertion time of only 5.5 months.³⁹⁶ Considering the delicacy and importance of the human organ into which the device was to be inserted for extended periods, such evidence seems sufficient to demonstrate a flagrant disregard for consumer safety.³⁹⁷

Despite significant authority to the contrary, a majority of courts considering the issue have held manufacturers liable for aggravated harm resulting from a failure to design their products in a manner reasonably calculated to minimize likely injuries from foreseeable accidents.³⁹⁸ In *Smith v. Cessna Aircraft Co.*,³⁹⁹ for example, the jury rendered a substantial punitive damages award against the manufacturer of a private airplane⁴⁰⁰ upon a finding that the defendant had been grossly negligent in failing to test the fuel system for "crashworthiness." The pilot had aborted a take-off after one of the airplane's doors popped open, and the plane crashed through a fence at the end of the runway at a speed of twenty-five to thirty miles per hour.⁴⁰¹ While no one was injured in the crash itself, the fire that soon erupted, fed by a steady stream of fuel pouring into the cabin, burned three passengers to death and seriously

396. *Hearings on Regulation of Medical Devices (Intrauterine Contraceptive Devices) Before the Subcomm. of the House Comm. on Governmental Operations* 61, 93d Cong., 1st Sess. 61 (1973) (testimony of Russell J. Thomsen, M.D.). In addition to the inadequate testing, the company had engaged in a fraudulent-type promotional campaign based upon the results of the deficient tests. "[T]he Dalkon Shield and its promotion provide the classic example of the misuse of statistics to market an item." *Id.* See Note, *The Intrauterine Device: A Criticism of Governmental Compliance and an Analysis of Manufacturer and Physician Liability*, 24 CLEV. ST. L. REV. 247, 287-90 (1975). See generally M. DIXON, *DRUG PRODUCT LIABILITY* § 11.43 (1975).

397. Similarly, in the MER/29 cases, Richardson-Merrell clearly had been put on notice that further pre-marketing testing was absolutely necessary when the results of its animal tests revealed that the drug might well cause damage to the user's eyes.

398. See, e.g., *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968); *Bolm v. Triumph Corp.*, 33 N.Y.2d 151, 305 N.E.2d 769, 350 N.Y.S.2d 644 (1973); *Baumgardner v. American Motors Corp.*, 83 Wash. 2d 751, 522 P.2d 829 (1974). See generally 1 L. FRUMER & M. FRIEDMAN, *supra* note 372, at § 7.01(3); *Montgomery & Owen*, *supra* note 2, at 833-36.

399. No. 70-9255-L (193d Jud. Dist. Ct. Dallas County, Tex., Nov. 26, 1972), noted in 16 A.T.L.A.N.L. 30 (1973).

400. The jury awarded approximately \$200,000 in compensatory and \$180,000 in punitive damages. See 16 A.T.L.A.N.L. 30 (1973).

401. *Id.*

injured a fourth.⁴⁰² Cessna was properly held liable in this case for compensatory damages for failing to design a "crashworthy" airplane. However, the jury's punitive damages award perhaps can be better explained by the tragic circumstances of the accident than by any sound determination that Cessna had flagrantly disregarded passenger safety. The costs and dangers of thoroughly crash-testing all Cessna airplanes, some models costing millions of dollars, would most certainly be prohibitive. Thus, the company's decision to rely instead upon drawing-board engineering estimates of safety performance and rigorous flight-testing short of actual crashes seems reasonable, and, absent other evidence of disregard for passenger safety, does not warrant punishment beyond liability for compensatory damages.

On the other hand, when a particular product can be economically crash-tested, the manufacturer's failure to do so may well demonstrate a flagrant disregard for public safety. Thus, in *Sabich v. Outboard Marine Corp.*,⁴⁰³ a passenger on a "trackster" snow vehicle manufactured by the defendant was seriously injured when the vehicle traversed a rock and rolled over while descending a slope varying in grade from twenty-four to thirty-eight degrees. Despite promotional representations that the vehicle could be operated on slopes of up to forty-five degrees and that it would run smoothly over rocks and stones, the manufacturer admitted that it had never tested the trackster on inclines to determine the point at which the vehicle would overturn.⁴⁰⁴ Accordingly, the jury awarded large compensatory damages and more than \$1 million in punitive damages.⁴⁰⁵ The punitive damages award in this case appears appropriate in view of the manufacturer's reckless failure to subject its potentially lethal yet relatively inexpensive product to simple crash-testing, and its misrepresentations of the vehicle's performance capabilities—represen-

402. See Second Amended Original Petition of Joyce Smith at 2-3, *Smith v. Cessna Aircraft Co.*, cited note 399 *supra*.

403. 60 Cal. App. 3d 591, 131 Cal. Rptr. 703 (1976).

404. Letter from plaintiff's attorney, Daniel E. Wilcoxon, to David G. Owen, July 16, 1975.

405. The jury returned a verdict for \$600,000 compensatory and \$1,254,000 punitive damages. 60 Cal. App. 3d at —, 131 Cal. Rptr. at 705. On appeal, the court emphasized that the defendant had knowingly designed the vehicle to climb slopes steeper than those that it could descend, as well as the defendant's failure to warn consumers adequately of this hazard. 60 Cal. App. 3d at —, 131 Cal. Rptr. at 707-09. The court nevertheless reversed the punitive damages award because of the trial court's erroneous instruction on the burden of proof required to sustain the underlying fraud cause of action. 60 Cal. App. 3d at —, 131 Cal. Rptr. at 709-11. See note 443 *infra*.

tations calculated to deceive consumers who would naturally assume there was a reasonable basis to support them.⁴⁰⁶

In another recent case, settled prior to trial, the four-year-old plaintiff was seriously injured when her nightgown caught fire and burned quickly and intensely. The defendant manufacturer of children's clothing admitted that, despite its knowledge of a large number of similar injuries and deaths occasioned by flammable fabrics,⁴⁰⁷ it had nevertheless selected and used the fabrics in the nightgown without regard to flammability⁴⁰⁸ and had further failed to subject them to any meaningful tests.⁴⁰⁹ A punitive damages verdict might have been appropriate in this case because of the manufacturer's apparently flagrant indifference to consumer safety.⁴¹⁰

Besides the hidden dangers in a product's design that may be discovered by testing prototypes, physical flaws in individual products may crop up at various points in the manufacturing process.⁴¹¹ The effectiveness of a manufacturer's quality control procedures will determine both the type and number of flaws permitted to remain in a product line.⁴¹² A manufacturer may make an erroneous risk-benefit judgment by spending too little for quality control in view of the injuries likely to result. The manufacturer would then be liable in negligence for any actual injuries to consumers resulting from its erroneous decision.⁴¹³ On occasion, however, a manufacturer may fail to establish adequate quality control procedures in flagrant disregard of the possibility that consumers may be excessively injured as a

406. *Domich v. Jee's Juvenile Shop*, No. 225782 (Super. Ct. Sacramento County, Cal., filed Aug. 28, 1972). The case was settled prior to trial for \$458,500. See *Sacramento Bee*, Aug. 28, 1975, § B, at 2, col. 3.

407. Brief for Plaintiff at 10, *Domich v. Jee's Juvenile Shop*, cited note 406 *supra*.

408. *Id.* at 2, 11.

409. See *id.* at 5-6, 11-13.

410. In this section, it is assumed that the excessive hazard present in the product, which resulted either from defective design or production processes, is in fact hidden from the manufacturer. In some cases, however, the manufacturer will design a product in a manner that it *knows* will expose consumers to an excessive risk of harm. For example, in *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976), discussed in notes 474-80 *infra* and accompanying text, the Project Manager "admitted at trial that at the time that he designed the transformer he had anticipated that it might catch fire in customers' homes." 523 F.2d at 105. The conduct in this type of case may be characterized as the design of a product in *conscious* disregard of a serious risk to consumers. This of course is substantially more culpable than a manufacturer's reckless failure to discover a product hazard, the more typical form of misbehavior that may also appropriately support a punitive damages judgment.

411. See G. PETERS, *supra* note 235, at 59-60.

412. See Weinstein, Twerski, Piehler & Donaher, *supra* note 50, at 447; note 236 *supra* and accompanying text.

413. See generally 1 L. FRUMER & M. FRIEDMAN, *supra* note 372, at § 6.01[1].

result.⁴¹⁴ If a consumer is injured as a consequence of this sort of quality control misbehavior, punitive damages would be in order.

Juries have awarded punitive damages in several reported cases involving impure drugs, food, and beverages that were marketed as a result of inadequate quality control, but these have all been overturned by the trial or appellate court for inadequate evidence of reckless or intentional misconduct.⁴¹⁵ In one unreported case of this type,⁴¹⁶ the jury tentatively decided⁴¹⁷ to assess a local Pepsi-Cola bottling company \$6,500 in punitive damages when the plaintiff became ill after drinking from a bottle of Pepsi-Cola that contained a rusty nail. The jury had heard evidence on the frequency with which the bottle-cleaning solution and brushes were changed, and the manager of the bottling plant had admitted that an electronic scanning device, equipment the defendant did not own, would have detected the rusty nail. The trial judge, however, instructed the jury that punitive damages could not be awarded because the plaintiff had not shown that the defendant knew the nail was in the bottle or had intended to harm the plaintiff.⁴¹⁸ This instruction reflects a very narrow view of the conduct for which punitive damages may be awarded. Instead, the jury should probably have been allowed to determine from all the evidence whether the manufacturer's purity control procedures demonstrated a reckless disregard of consumer safety.⁴¹⁹ Particularly compelling evidence under this standard would be the manufacturer's failure to make relatively inexpensive quality control improvements after learning that existing procedures were inadequately detecting impure products that were causing consumers substantial harm.⁴²⁰

The manufacturer alone has the ability to screen out many product hazards that are hidden from the consumer.⁴²¹ A plaintiff

414. For example, to cut costs, a manufacturer may choose to omit a finishing process and then structure its "quality" control procedure to let such "unfinished" products through. Costs will indeed be cut; so too may be the fingers and hands of thousands of consumers whose injuries will rarely be serious enough to make litigation economically feasible unless punitive damages are recoverable.

415. See, e.g., *Perry v. Kelford Coca-Cola Bottling Co.*, 196 N.C. 690, 146 S.E. 805 (1929); *Crews v. Sikeston Coca-Cola Bottling Co.*, 240 Mo. App. 993, 225 S.E. 2d 812 (1949).

416. *Brown v. Pepsi-Cola Bottling Co.*, No. 13,851 (C.P., Dorchester County, S.C., Nov. 26, 1974).

417. See note 203 *supra* and accompanying text.

418. Letter from Reese I. Joye, Jr., to David G. Owen, July 16, 1975.

419. See notes 29-34 *supra* and accompanying text.

420. See notes 458-94 *infra* and accompanying text.

421. See note 1 *supra* and accompanying text.

who can successfully attribute his injuries to prototype testing or quality control procedures so grossly inadequate in view of the known risks as to constitute a reckless indifference to the public safety should be permitted to recover punitive damages.

4. *Failure to Warn of Known Dangers*

The assumption underlying the requirement that a manufacturer test the design of its products is that the manufacturer will take whatever steps are reasonably necessary to correct or to minimize hazards discovered by such tests. For example, if initial tests identify a potential defect, further tests may be required to determine the nature and extent of the danger presented.⁴²² Ideally, such tests would reveal whether the product needs to be redesigned or merely labelled with a suitable warning to help reduce the particular risk.⁴²³ In a fairly large proportion of the cases studied, punitive damages claims were based at least in part on a theory that the manufacturer had recklessly failed to warn consumers adequately of a known and serious hazard in its product.

Consumers themselves can often most efficiently monitor the safety performance of products inclined to develop dangerous weaknesses during their useful lives, and manufacturers of such products thus should be allowed to shift this responsibility to them. However, when a manufacturer delegates this responsibility, it should also inform users of the procedures necessary to test the product for developing failures. This is particularly true when the product is as complex and potentially dangerous as an airplane. In *Engbreth v. Fairchild Hiller Corp.*,⁴²⁴ for example, the defendant manufacturer of the F-27 aircraft had been informed by its designer of tests in which fatigue cracking of the outer wing had caused catastrophic wing failures.⁴²⁵ Claims for compensatory and punitive damages were brought against the defendant for the wrongful deaths of four persons killed when an in-flight wing failure of this type resulted in a crash. Perhaps the most serious allegation of misconduct was Fairchild's failure to provide information and assistance necessary to enable owners properly to inspect wing surfaces periodically for

422. See note 393 *supra* and accompanying text.

423. See generally Twerski, Weinstein, Donaher & Piehler, *The Use and Abuse of Warnings in Product Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495 (1976).

424. No. A-9-71 (D. Alas., filed Jan. 18, 1971).

425. Plaintiff's Memorandum in Opposition to Motion for Partial Summary Judgment 2-4, *Engbreth v. Fairchild Hiller Corp.*, cited note 424 *supra*.

developing fatigue cracks. The defendant admitted that an owner-inspection process was necessary to help prevent catastrophic wing failure; that accordingly it had assured the FAA that Fairchild would instruct and assist F-27 owners in establishing proper X-ray structural inspection programs; and that the aircraft's owner had specifically informed Fairchild that his employees were "not very experienced at reading X-rays."⁴²⁶ Nevertheless, Fairchild failed to so instruct owners until after the accident,⁴²⁷ and there was even some evidence that Fairchild had used a particular X-ray technique because it tended to conceal the full extent of fatigue cracking in the wing.⁴²⁸ In fact, the revised inspection program ordered by the FAA after the crash revealed serious fatigue cracking in the wings of at least nine of the first sixty-five F-27s sold.⁴²⁹ Most of this evidence was admitted by the defendant and, after the trial judge had ruled that the punitive damages claim was proper,⁴³⁰ the case was settled prior to trial for more than \$2 million. This large settlement probably reflected the likelihood of a large punitive damages award.⁴³¹

In several cases that have proceeded to trial, juries have returned punitive damages verdicts for a manufacturer's reckless failure to warn adequately of a serious known defect in the product. One such case, *Johnson v. Husky Industries, Inc.*,⁴³² was an action for the wrongful death of a family of four by asphyxiation from carbon monoxide fumes emitted by charcoal briquets that the defendant had manufactured and packaged. The only warning on the bag of briquets stated: "CAUTION—FOR INDOOR USE—COOK ONLY IN PROPERLY VENTILATED AREAS." The plaintiffs contended that before the bag of briquets at issue was marketed, Husky had learned that its product could be lethal when used indoors without sufficient ventilation.⁴³³ Finding that the failure to provide an

426. *Id.* at 7.

427. *Id.* at 8.

428. *Id.* at 9.

429. *Id.*

430. Unpublished Memorandum and Order, *Engbreth v. Fairchild Hiller Corp.*, cited note 424 *supra*, Nov. 20, 1972.

431. One plaintiff recovered \$760,000, two recovered \$600,000 apiece, and the fourth recovered \$110,000 for a total settlement of \$2,070,000. *Id.* The plaintiffs' lawyer speculated that the case would have been settled for "at least \$750,000 to \$1,000,000 less had it not been for the punitive damages question or the case might have gone to trial." Letter from Bernard P. Kelly, attorney for plaintiffs, to David G. Owen, June 24, 1975.

432. — F.2d — (6th Cir. 1976). See note 445 *infra* for another case against Husky on similar facts.

433. An officer of the defendant testified that he knew of the general risk prior to the accident. On appeal, however, the court ruled that the evidence was insuffi-

adequate warning was grossly negligent under these circumstances, the jury found for the plaintiffs on both compensatory and punitive damages claims.⁴³⁴

A comparison of two unrelated wrongful death actions against Beech Aircraft Corporation,⁴³⁵ both involving claims that the manufacturer had recklessly failed to warn of a known danger, may further assist in determining when a failure to warn warrants a punitive damages award. In both cases the persons were killed or injured when a Beech Baron aircraft crashed after engine failure caused by fuel starvation. Beech Aircraft knew from a March 13, 1968, test report that a defect in the aircraft's fuel system design would cause fuel starvation ("unporting")⁴³⁶ if the aircraft engaged in certain maneuvers when its fuel level was low.⁴³⁷ The plane involved in *Pease v. Beech Aircraft Corp.*⁴³⁸ crashed on June 25, 1968, before its owner had been warned of the defect. The plaintiffs brought their action in fraud, and the jury awarded them substantial compensatory and punitive damages.⁴³⁹ The plane in *Kritser v. Beech Aircraft Corp.*⁴⁴⁰ crashed on October 25, 1968, after the defendant had added the following warning to its flight manual: "Flight Operation 'CAUTION' To prevent fuel flow interruption, avoid prolonged operation in a slip or skid attitude under low fuel conditions."⁴⁴¹ The jury awarded compensatory damages after finding that the warning was inadequate to protect the plaintiff pilot who had unsuccessfully

cient to establish the requisite culpability for punitive damages, due in part to the weakness of the plaintiff's proof of earlier successful lawsuits against the defendant based on the same hazard. — F.2d at —. See note 445 *infra*.

434. The total verdict was for \$425,000, which was divided equally between compensatory and punitive damages. The trial court's denial of the defendant's motion for j.n.o.v. or for a new trial was reversed by the Sixth Circuit as to punitive damages and affirmed as to compensatory damages. — F.2d at —.

435. *Kritser v. Beech Aircraft Corp.*, 479 F.2d 1089 (5th Cir. 1973), and *Pease v. Beech Aircraft Corp.*, 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (1974).

436. 38 Cal. App. 3d at 459, 113 Cal. Rptr. at 421. See also 479 F.2d at 1091.

437. 38 Cal. App. 3d at 458, 113 Cal. Rptr. at 421-22.

438. 38 Cal. App. 3d 450, 113 Cal. Rptr. 416 (1974).

439. The trial judge, however, subsequently ordered a new trial on the punitive damages issue on grounds unrelated to the conduct of the defendant. The court held, first, that the representatives of the four persons killed in the crash could not recover punitive damages because the legislative history behind California's wrongful death act precluded awards in such cases. 38 Cal. App. 3d at 459-62, 113 Cal. Rptr. at 422-24. Secondly, the court upheld the trial court's order granting a new trial on the jury award of \$3,450,000 in punitive damages made to the owner of the airplane, also a plaintiff in the action against Beech, because of an erroneous jury instruction on the elements required to sustain an action in fraud. Specifically, the element of reliance was omitted from the charge. 38 Cal. App. 3d at 462-65, 113 Cal. Rptr. 424-26. See note 443 *infra*.

440. 479 F.2d 1089 (5th Cir. 1973).

441. 479 F.2d at 1094.

attempted to heed it. The trial judge, however, held that there was no evidence of gross negligence and thus withdrew the punitive damages claim from the jury.⁴⁴²

The fact situations in *Pease*, *Kritser* and *Johnson* all pose the same fundamental question: did the defendant's failure to warn consumers exhibit such a flagrant disregard for their safety that punitive damages should be assessed? Had the plaintiffs in *Pease* relied on a general theory of reckless failure to warn of a known danger, instead of on fraud, the jury would have been required to determine whether Beech's failure to warn owners more promptly of a defect in its aircraft amounted to a flagrant disregard for their safety.⁴⁴³ In

442. In affirming, the circuit court reasoned:

[T]he jury determined that Beech Aircraft gave Kritser notice of fuel displacement under some circumstances and warned him against prolonged slips. The fact that the company took such steps to inform Kritser of potential danger absolved Beech Aircraft of liability only for punitive but not compensatory damages. The defendant did not exhibit the conscious indifference toward the public which generally typifies gross negligence, . . . and there is no evidence that it committed any wilful act or omission.

479 F.2d at 1097 (footnote omitted).

443. In most cases in which the plaintiff can establish a fraudulent attempt by the manufacturer to mislead the public concerning a material product hazard, the plaintiff should also be in a position to establish that the defendant failed to warn the public in reckless disregard of the presence of the hazard in the product. The plaintiffs in *Pease* were somewhat restricted, however, by the language of the California statute that permits punitive damages awards only "where the defendant has been guilty of oppression, fraud or malice . . ." CAL. CIV. CODE ANN. § 3294 (1970). Some courts have construed the statutory words "oppression" and "malice" narrowly to exclude "reckless" or "wanton" misconduct. See, e.g., *G.D. Searle & Co. v. Superior Ct.*, 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975); note 505 *infra*. But see *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). The plaintiffs in *Pease* thus may have felt compelled to base their punitive damages claim upon an allegation of fraud. This was rather unfortunate for the airplane owner in *Pease*, since the judge neglected to charge the jury on the element of reliance. See also *Sabich v. Outboard Marine Corp.*, 60 Cal. App. 3d 590, 131 Cal. Rptr. 703 (1976).

A general requirement in products liability litigation that would restrict punitive damages awards to cases in which there has been provable fraud not only would be doctrinally unsound but also would give rise to significant and unnecessary difficulties. In some cases, a plaintiff will be able to trace his injury to a defect in a product that was kept on the market in a defective condition only because of the manufacturer's success in misleading the public concerning the product's safety. Many such plaintiffs, however, will be unable to point to any specific act of fraudulent-type behavior on which they relied to their detriment and thus will fail if they base their claims upon the traditional theory of fraud and deceit. If, on the other hand, these plaintiffs were allowed to proceed on a theory of reckless failure to warn, they would be entitled under modern principles to a *presumption* that they would have read and heeded the warning. See, e.g., *Reyes v. Wyeth Laboratories*, 498 F.2d 1264, 1281-82 (5th Cir. 1974), *cert. denied*, 419 U.S. 1096 (1974); *Nissen Trampoline Co. v. Terre Haute First Natl. Bank*, 332 N.E.2d 820, 826-27 (Ind. App. 1975). This is the better result. While the manufacturer in this type of case may not intend to mislead specific consumers by its fraudulent-type conduct, the deceitful conduct very probably is intended to mislead some persons in order to keep the product on the market in a condition that it knows will expose *all* consumers to an excessive risk of harm. Cf. *Hauter v. Zogarts*, 14 Cal. 3d 104, 534 P.2d 577, 120 Cal. Rptr.

Kritser and *Johnson*, on the other hand, scrutiny should properly have focused on whether the inadequacy of the warning actually given exhibited such a disregard for consumer safety. Assuming the evidence in *Johnson* was sufficient for the jury to find that Husky knew of the risk of asphyxiation,⁴⁴⁴ the trial court was probably correct in allowing the jury to find as reckless, if not conscious, misconduct the defendant's failure to convey in its warning any notion of the actual extent or nature of the danger presented.⁴⁴⁵ *Kritser*, however, is a more difficult case. The warning did indicate in general terms the true nature of the risk, but the conditions of operation that would trigger a failure were described so vaguely that some pilots might be unable to put the information to practical use. While it could be argued that the warning was so vague as to show a reckless indifference to the safety of aircraft owners, it could also be argued that the manufacturer expected the warning to be read by experienced pilots who would appreciate the nature and seriousness of the danger. It thus may have appeared to the trial judge that the defendant showed at least the rudiments of a good faith attempt to warn consumers adequately, and from this perspective the court was probably correct in withdrawing the punitive damages claim from the jury.

Warnings may be inadequate not only in substance but also in the manner in which they are communicated. Even the best of warnings will be worthless unless certain conditions are met: first, the warning must be likely to reach the consumer or someone who will act on his behalf; second, it must be transmitted in a way likely to attract his attention; and, third, it must be in a form that he is likely to understand.

681 (1975); Phillips, *Product Misrepresentation and the Doctrine of Causation*, 2 HOFSTRA L. REV. 561, 563-65 (1974). Perhaps the reliance of some can fairly be imputed to all. Alternatively, all consumers could be said to rely upon an implicit representation of product manufacturers that all necessary warnings have been supplied and that when product defects are discovered they will not be deceitfully covered up. Cf. *Hanberry v. Hearst Corp.*, 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (1969); Shapo, *supra* note 169, at 1367-68. See also R. NORDSTROM, LAW OF SALES 209 (1970) ("The court's task is to determine whether that injury was caused by a defect in the product, and any statements made by the seller designed to induce the public to buy his product are relevant in making this determination. . . . The 'basis of the bargain' is also the item purchased, and a part of that bargain includes the statements which the seller made about what he sold").

444. See note 433 *supra*.

445. See *Hill v. Husky Briquetting, Inc.*, 54 Mich. App. 17, 220 N.W.2d 137, *affd.*, 393 Mich. 136, 223 N.W.2d 290 (1974) (reversing a directed verdict for the defendant in a similar case involving a death and an injury claimed to have been attributable to the inadequacy of the warning provided by Husky on its bags of charcoal briquettes).

Illustrative is *Hoffman v. Sterling Drug, Inc.*,⁴⁴⁶ in which an action was brought against a drug manufacturer for eye injuries attributable to the use of chloroquine phosphate, a prescription drug marketed under the trade name "Aralen." The plaintiff's claim for punitive damages was based on allegations that the manufacturer had inadequately warned the FDA and the medical profession that the drug could cause retinal damage.⁴⁴⁷ Sterling Drug showed in defense that once it learned of the danger its salespersons warned physicians by mailing or personally delivering product cards and promotional brochures containing the necessary warning. Nevertheless, the Third Circuit Court of Appeals overruled the district court's refusal to submit the punitive damages claim to the jury and remanded on that issue,⁴⁴⁸ holding that the manufacturer's duty "was to warn of retinal damage in a manner which could be expected to alert the medical profession."⁴⁴⁹ Pointing to evidence that many physicians pay little attention to comments of drug company salespersons or to promotional literature received in the mail, the court stated that a drug manufacturer "must be charged with knowledge of the workings of the distribution system" it selects to convey its warnings to the medical community.⁴⁵⁰ The court concluded that on these facts a jury could properly find that Sterling's "failure to take action reasonably calculated to warn physicians of a risk of great magnitude

446. 485 F.2d 132 (3d Cir. 1973).

447. 485 F.2d at 144-45 n.41.

448. 485 F.2d at 147.

449. 485 F.2d at 146-47.

450. 485 F.2d at 146. The court suggested by way of example that in this case an adequate warning should have been included at an earlier date in the Physician's Desk Reference or in "Drug Precaution" letters individually sent to physicians. 485 F.2d at 147. It is noteworthy that the court "charges" the defendant with knowledge that may be used in partial support of a punitive damages award. There are some undeniable overtones of strict accountability in this phraseology, and the thrust of the statement may be that the failure of a manufacturer to have knowledge of the workings of its distribution system will automatically be deemed to be a reckless omission when the proper operation of the system is necessary to prevent the public from being exposed to a hazard known to exist in the product.

Despite the novelty of "charging" a defendant with knowledge of its business in the punitive damages context, and it may indeed be proper in this context, the principle is an accepted one in products liability law involving claims for compensatory damages. See, e.g., *Reyes v. Wyeth Laboratories*, 498 F.2d 1264, 1277 (5th Cir. 1974); 2 F. HARPER & F. JAMES, *supra* note 139, at 1541; Noel, *supra* note 390, at 847-55. This principle was noted in the first reported products liability case awarding punitive damages. *Fleet v. Hollenkemp*, 52 Ky. 175, 182, 13 B. Mon. 219, 228 (1852). Rather than "charging" a defendant with knowledge of his business, perhaps the same result could be achieved more comfortably in punitive damages litigation by utilizing an evidentiary presumption that product manufacturers understand the nature of their particular callings.

was in reckless disregard of the public's health" and that a jury thus would have grounds for a punitive damages award.⁴⁵¹

Finally, there are cases in which a substantively adequate warning is properly conveyed to a consumer who comprehends the risk but is nevertheless incapable of taking practical steps to reduce it. Judicial opinions in such cases often discuss the sufficiency of the warning; however, these cases are more properly analyzed by focusing on the adequacy of the product's design. The latter approach is more appropriate because the obligation to warn arises only when a warning could in some way help to reduce the risk of harm. Thus, if a warning cannot adequately protect consumers, and if a product can reasonably be redesigned to reduce the risk, the warning no matter how complete is hardly "adequate" to remedy an unreasonable risk of harm.⁴⁵²

In *Moore v. Jewell Tea Co.*,⁴⁵³ for example, the plaintiff sustained eye injuries when a can of "Drano" drain-cleaner exploded on the counter as she was preparing to use it. The court upheld a jury award of punitive damages against the manufacturer primarily on the ground that it had failed to warn consumers of a known and serious risk of harm.⁴⁵⁴ Yet the defendant's failure to warn consumers should have been irrelevant to a determination of liability for either punitive or compensatory damages. Perhaps the plaintiff could have worn goggles to protect herself had she in fact been warned, but clearly it would be unreasonable to expect her to do so. Since even a complete warning in this case would have been inadequate to protect the plaintiff, the inquiry for both compensatory and punitive damages liability should have focused exclusively on the adequacy of the design and testing of the Drano container.⁴⁵⁵

It is axiomatic that a manufacturer owes a duty to consumers to

451. 485 F.2d at 147. After five weeks of retrial the case was settled for \$600,000, *see* 18 A.T.L.A.N.L. 120 (1975), \$163,000 in excess of the original verdict for compensatory damages. *See* 485 F.2d at 135. Several pretrial matters on the remand of the case are reported in 374 F. Supp. 850 (M.D. Pa. 1974).

452. *See generally* Twerski, Weinstein, Donaher & Piehler, *supra* note 423, at 501-05, 517-21.

453. 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969), *affd.*, 46 Ill. 2d 288, 263 N.E.2d 103 (1970) (no discussion of punitive damages issue in Supreme Court opinion).

454. 116 Ill. App. 2d at 136-37, 253 N.E.2d at 649 (jury award of \$920,000 in compensatory damages to plaintiff and her husband and \$10,000 in punitive damages to plaintiff).

455. In fact, in addition to the failure of the manufacturer to warn of the danger, an important basis for the court's decision sustaining the punitive damages verdict was the defendant's failure to test the container to determine whether it could safely contain the cleaning substance that it knew to be potentially explosive. 116 Ill. App. 2d at 136, 253 N.E.2d at 649.

warn them adequately of hidden dangers in its products.⁴⁵⁶ If the manufacturer knows of a danger and is able to convey this information effectively to consumers at reasonable expense, the failure to take such action may evidence a flagrant indifference to public safety. Punitive damages may then be appropriate. Moreover, if a manufacturer consciously withholds information of a substantial hazard from consumers to protect its general reputation and its marketing of the product,⁴⁵⁷ a punitive damages assessment would appear necessary both to punish the defendant and to make it clear that such behavior will be neither tolerated by society nor profitable for the manufacturer.

5. *Post-Marketing Failures to Remedy Known Dangers*

The discussion to this point has primarily considered whether it is proper to characterize as flagrant misconduct a manufacturer's decision to market a product it knows is likely to be excessively dangerous.⁴⁵⁸ Occasionally, however, a manufacturer learns that its product is likely to be defective only after the product has reached consumers. These cases raise two questions: first, whether the manufacturer is under any legal duty to remedy defects in its products that are already in use; and, second, if there is such a duty, under what circumstances its breach should give rise to a claim for punitive damages.

Although a manufacturer's post-sale responsibilities to consumers have yet to be clearly defined, several courts have enunciated a rule requiring manufacturers to take "all reasonable means" to remedy defects discovered in products already marketed.⁴⁵⁹ This rule was

456. See generally RESTATEMENT (SECOND) OF TORTS §§ 388, 402A, comment j (1965); 1 L. FRUMER & M. FRIEDMAN, *supra* note 372, at § 8; Dillard & Hart, *Product Liability: Directions for Use and the Duty To Warn*, 41 VA. L. REV. 145 (1955); Kidwell, *The Duty to Warn: A Description of the Model of Decision*, 53 TEXAS L. REV. 1375 (1975); Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 SW. L.J. 256, 264-67 (1969); Twerski, Weinstein, Donaher & Pichler, *supra* note 423.

457. See notes 181-84 *supra* and accompanying text; notes 478, 489-90 *infra* and accompanying text.

458. Alternatively, the manufacturer's marketing decision might reflect a conscious disregard for consumer safety where the manufacturer simply has no knowledge of whether the product might be unduly hazardous due to the gross inadequacies in its testing or inspection procedures. See notes 390-421 *supra* and accompanying text.

459. *Comstock v. General Motors Corp.*, 358 Mich. 163, 99 N.W.2d 627 (1959), is apparently the progenitor of the rule. *Accord*, *Braniff Airways, Inc. v. Curtis-Wright Corp.*, 411 F.2d 451 (2d Cir.), *cert. denied*, 396 U.S. 959 (1969); *Noel v. United Aircraft Corp.*, 342 F.2d 232 (3d Cir. 1965). See also *Balido v. Improved Mach., Inc.*, 29 Cal. App. 2d 644, 105 Cal. Rptr. 890 (1973); Patterson, *Products*

applied in *Braniff Airways, Inc. v. Curtiss-Wright Corp.*,⁴⁶⁰ which involved a claim against the manufacturer of an aircraft engine for compensatory damages resulting from a crash that occurred when overheating caused a cylinder to fail and to separate from the engine. The plaintiffs claimed the defendant learned of the design defect nearly eight months before the crash yet had failed to take effective remedial action. In reversing the trial court's directed verdict for the defendant on the negligence claims, the Second Circuit articulated the nature of a manufacturer's post-sale duties to consumers: "It is clear that after such a product has been sold and dangerous defects in design have come to the manufacturer's attention, the manufacturer has a duty either to remedy these or, if complete remedy is not feasible, at least to give users adequate warnings and instructions concerning methods for minimizing the danger."⁴⁶¹

Defining liability for compensatory damages in these terms raises a problem in determining what additional culpability is needed to support a claim for punitive damages in a post-marketing case. That is, according to the *Braniff Airways* test, the misconduct that must be proved to recover compensatory damages—failing to remedy a known and reasonably curable defect—is very similar to the kind of misconduct usually sufficient for punitive damages in the pre-sale cases.⁴⁶² The primary problem, then, is whether there is any difference in post-sale cases between the standard of liability for compensatory damages and that for punitive damages. A corollary problem is whether punitive damages may be awarded at all in such cases.

A solution is to assume that the *Braniff Airways* court simply articulated a test for compensatory damages liability in terms that reflected the facts of the case and did not even consider whether punitive damages may in fact have been appropriate. The court most likely was neither attempting to exclude manufacturers less culpable than the defendant from post-sale liability for compensatory damages nor to rule out liability for punitive damages in all post-sale cases. This interpretation would be the most desirable since it would permit a manufacturer to be held answerable in negligence for compensatory damages if it did not know, but should have known, that its marketed product contained a defect requiring remedial

Liability: The Manufacturer's Continuing Duty To Improve His Product or Warn of Defects After Sale, in P. RHEINGOLD & S. BIRNBAUM, *PRODUCT LIABILITY: LAW, PRACTICE, SCIENCE* (2d ed. 1975).

460. 411 F.2d 451 (2d Cir.), *cert. denied*, 396 U.S. 959 (1969).

461. 411 F.2d at 453.

462. See notes 422-57 *supra* and accompanying text.

action.⁴⁶⁸ If the manufacturer were then shown to have learned of a probable defect in its marketed product, its failure to warn consumers or to recall the product might justify a punitive damages award as well.

The failure of a manufacturer to remedy a known defect in an already marketed product has been important in several products liability cases in which punitive damages claims have been made. For example, a basis for the punitive damages claim in *Hoffman v. Sterling Drug, Inc.* was the defendant's failure to warn consumers promptly once it learned from users of its drug that it contained a risk of serious side effects.⁴⁶⁴ In *Deemer v. A. H. Robins Co.*,⁴⁶⁵ the plaintiff based her punitive damages claim in part on the IUD manufacturer's failure to mail remedial "Dear Doctor" letters once it learned of the seriousness of the dangers in using the device.⁴⁶⁶ In *Rosendin v. Avco Lycoming Div.*,⁴⁶⁷ the large size of the punitive damages award⁴⁶⁸ can be partly explained by evidence that the company knew of similar fatigue failures in its engines yet neglected to recall the defective engines or even to warn owners of the danger.⁴⁶⁹ The plaintiff's evidence also indicated that until 1962 the defendant's service department had no procedure for retaining, much less analyzing, complaints of engine failures;⁴⁷⁰ that the company had made no

463. Cf. Lorenz, *Some Comparative Aspects of the European Unification of the Law of Products Liability*, 60 CORNELL L. REV. 1005, 1015 (1975) ("[The consumer] may expect a manufacturer to constantly observe his products after having put them into the stream of commerce. In other words, the manufacturer is under a duty of product observation . . .").

464. 485 F.2d 132, 145-47 (3d Cir. 1973).

465. No. C-26420 (Dist. Ct., Sedgwick County, Kan., filed Oct. 1972), *appeal filed*, No. 48,504, Kan. Sup. Ct., Aug. 23, 1976.

466. Pretrial Order at 4, *Deemer v. A.H. Robins Co.*, cited note 465 *supra*.

467. No. 202715 (Super. Ct. Santa Clara County, Cal., March 8, 1972), *affd.*, No. 32,999, Cal. Ct. App., 1st Dist., Feb. 24, 1976, *cert. denied*, Sup. Ct. Cal. (1976).

468. The amount of punitive damages assessed by the jury against the defendant was \$10,500,000.

469. See Brief for Plaintiffs at 46-52, *Rosendin v. Avco Lycoming Div.*, cited note 467 *supra*.

470. *Id.* at 46-47. The failure of manufacturers of products that are likely to be particularly hazardous if defective to maintain any system for receiving and considering product failure information from the field may well indicate a conscious or reckless disregard for consumer safety. The Consumer Product Safety Commission proposed a rule pursuant to section 16(b) of the Consumer Product Safety Act, 15 U.S.C. § 2065(b) (Supp. IV 1974), that would require product manufacturers to maintain files of consumer complaints: "The proposal under consideration would require records of all consumer product safety complaints to be maintained in an accessible location for a period of at least five years from receipt." 39 Fed. Reg. 31,916 (1975). "Although the proposed rule may have an effect on private products liability litigation, the Commission believes that the proposed rule is within its authority and it believes that the benefit to be obtained from the ability to monitor

effort to solicit information on engine failures from its customers; and that the company even had an unwritten policy of not taking corrective action until it was notified of a failure rate of between one and two per cent.⁴⁷¹ Finally, in *Johnson v. Huskey Industries, Inc.*,⁴⁷² in an opinion denying the defendant's motion for a directed verdict, the trial judge held that the jury could reasonably find the defendant grossly negligent for failing to add an adequate warning to its unsold bags of charcoal briquets, after earlier claims had been made against the company for deaths purportedly caused by the product.⁴⁷³

A consideration of three recent cases will further help to clarify the type of post-marketing conduct that may support a punitive damages claim. *Gillham v. Admiral Corp.*⁴⁷⁴ was an action brought against the manufacturer of color television sets by a seventy-five-year-old woman who was severely burned when her set caught fire. The jury awarded the plaintiff compensatory damages, punitive damages and attorneys' fees, but the district court vacated the awards of punitive damages and attorneys' fees upon motion of the defendant.⁴⁷⁵ The Sixth Circuit reversed and remanded, however, ordering that judgment be entered upon the verdict.⁴⁷⁶ The evidence indicated that the fire had been caused by a defectively designed high voltage transformer; that the defendant knew of at least ninety-one similar fires, some of which had likewise burned homes and caused personal injuries, over the four-year period preceding the failure of the plaintiff's set; that two years before the plaintiff's injury, all sixteen transformers tested by one of the defendant's own engineers

consumer product safety complaints requires that the rule proposed be issued." *Id.* Violation of the rule could subject the manufacturer to civil or criminal penalties under the Act. *Id.* The proposed rule, however, has not yet been adopted. See note 531 *infra*.

471. Brief for Plaintiffs, *supra* note 469, at 47; see Order of Court at 3, *Rosendin v. Avco Lycoming Div.*, cited note 467 *supra* (unpublished opinion of trial court granting motion for new trial on punitive damages, June 7, 1972). As the Brief for Plaintiffs explained,

Any failures at all are intolerable In view of the serious consequences of a failure of an aircraft part, failures are not allowable in the industry, and every effort should be made to prevent them. . . . While you are waiting for the data to build up to a predetermined level of one, one and a half per cent or whatever per cent is established, the only way you get data is through accidents.

Brief for Plaintiffs at 51.

472. — F.2d — (6th Cir. 1976).

473. Memorandum Opinion and Order at 5, *Johnson v. Huskey Indus., Inc.*, Civil No. 3008 (E.D. Tenn. May 29, 1975). The punitive damages verdict was reversed on appeal. See notes 432-34 *supra* and accompanying text.

474. 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976).

475. "The jury awarded the plaintiff compensatory damages of \$125,000, punitive damages of \$100,000, and attorneys' fees of \$50,000.00." 523 F.2d at 104.

476. 523 F.2d at 109.

had caught fire;⁴⁷⁷ and that the manufacturer not only failed to recall the sets or even to warn consumers of the hazard, but also systematically attempted through its complaint manager,⁴⁷⁸ and even its

477. 523 F.2d at 105-06.

478. 523 F.2d at 106-07. The pattern of deliberate frustration of consumer complaints in *Gillham* is startling:

[W]hen a motel owner who had 20 Admiral sets in his motel inquired as to whether there was a defect after one set burned in a motel room, Admiral wrote him a letter telling him to place a claim with his insurance company, but not answering his question. Numerous individuals who inquired about the risk of fire in their sets received similar treatment. In April, 1970, a customer asked about the safety of color TV sets after her high voltage transformer had burned from what Admiral called a "normal transformer failure." I.F. Johnson, who was in charge of receiving and processing fire complaints, did not answer her question. He did tell her that she should go to her own insurance company, and he did write to an Admiral Service Manager saying, "We prefer not to answer some of the customer's questions in a letter. . . ." In another fire case in March, 1971, Johnson wrote to an Admiral representative, saying the customer would be given a new transformer free, if necessary, because the customer ". . . asked some very pointed questions relative to fires, and I would like to see him satisfied" Other customers received no answers or evasive answers when they inquired as to the hazard after experiencing a fire in an Admiral color TV set.

Brief for Plaintiff at 28-29, *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975). The company also practiced outright deceit. On May 4, 1970, with reports of more than 150 fires in its records, Admiral falsely reassured two customers: "It would seem evident from the information contained in your letter that it may be the high voltage transformer has developed an electrical defect. This would cause some smoke and an odor but not any flame that could damage your set or property." *Id.* at 31. Similarly, a few months later, I.F. Johnson sent the following answer to a customer who reported a fire in his Admiral color television that damaged his house: "The damage to your set could occur from improper service such as the incorrect setting of the high voltage by a technician, using an incorrect part or using a part not recommended by the Admiral Corporation. The fact that the set did operate for a period of five years indicates that it was basically designed in accordance with the technique and parts available at the time of manufacture." *Id.* at 31. Admiral failed to tell this customer that the engineer who designed the transformer "anticipated that it might catch fire in customers' homes." 523 F.2d at 108. Nor was the customer informed that the net addition to the production cost of installing safe transformers in some models, as other manufacturers had done for years, was only sixty cents. 523 F.2d at 107-08 n.3.

Admiral even deceived its own insurance company. In 1971, when the insurance company inquired whether Admiral had knowledge of any fires caused by television sets similar to one that had burned down the house of one claimant, I.F. Johnson had eleven fire reports on the same model in his file. He received the last report on the day that he informed Admiral's insurer that Admiral had not had any fires in the model. Brief for Plaintiff, *supra*, at 33.

An attorneys' fee award to the plaintiff, at least, appears appropriate in this context. One of the narrow situations in which the Supreme Court has held that attorneys' fees may be granted in federal equity cases in the absence of statutory authority occurs when the defendant has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons. . . ." *Alyeska Pipeline Serv. Co. v. Wilderness Soc.*, 421 U.S. 240, 258-59 (1975), *citing* *F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974); *see* note 154 *supra*. The Court has applied this standard and awarded attorneys' fees in a case in which the defendant shipowner ignored the plaintiff seaman's attempts to secure from the defendant illness compensation to which he was clearly entitled under the law of maintenance and cure:

In the instant case respondents were callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a result of that recalcitrance, libellant was forced to hire a lawyer and

counsel,⁴⁷⁹ to conceal the defect from consumers and to frustrate inquiries about the danger. When a manufacturer fails to take any steps whatsoever to remedy a hazard as serious as that in *Gillham*, even though it clearly knows of both the specific defect and the seriousness of the risk to consumers, a punitive damages assessment is particularly appropriate.⁴⁸⁰

A second recent case in which the jury awarded both compensatory and punitive damages against a manufacturer for breaching its post-marketing obligations is *Thomas v. American Cystoscope Makers, Inc.*⁴⁸¹ In this case the plaintiff physician burned an eye when electricity discharged from the metallic end of the eyepiece of a resectoscope (a surgical telescope) he was using. The jury assessed

go to a court to get what was plainly owed him under laws that are centuries old. The default was willful and persistent. It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one.

Vaughan v. Atkinson, 369 U.S. 527, 530-31 (1962). While the dissent expressed the view that counsel fees were an improper element of compensatory damages, it did state that a punitive damages award would be appropriate under the circumstances if the refusal to pay were shown to have "stemmed from a wanton and intentional disregard of the legal rights of the seaman" 369 U.S. at 540 (Stewart, J., dissenting).

The *Gillham* situation is clearly analogous to *Vaughan*. It is probable that the motivation of a manufacturer, like Admiral, in frustrating inquiries from consumers who have suffered losses from product failures is to avoid revealing to the public that its product is indeed defective. A manufacturer might seek to conceal the defectiveness of its product both to protect its general reputation and to reduce the number of consumers learning that their legal rights may have been violated by the manufacturer in order to avoid compensating for such injuries. See note 490 *infra* and accompanying text; notes 176-77, 457 *supra* and accompanying text. In short, a manufacturer's motivation for intentionally frustrating inquiries from injured consumers may "stem from a wanton and intentional disregard of the legal rights" of the inquiring consumers.

479. On April 11, 1973, a memorandum was sent by one of Admiral's in-house legal counsel to the official in charge of "product safety" asking whether Admiral "could keep claimants under better 'control' in cases such as this by informing the claimant that the matter has been referred to [the company's] insurance company who will contact them shortly. Alternatively, [the company] could inform them that a representative of National Service will make contact. . . . [S]o informed, claimant would be less inclined to get a lawyer involved." Brief for Plaintiff, *supra* note 478, at 34.

480. Plaintiff's counsel in *Gillham* argued cogently on appeal:

Considering Admiral's certain knowledge that its color TV sets were fire hazardous and its knowledge of the frequency with which such Admiral sets were igniting in customers' homes, and considering the extreme danger to which this exposed plaintiff and others, Admiral's failure to eliminate the hazard, or to warn plaintiff and others of the hazard, constitutes legal malice which justifies and even demands that Admiral be punished by the imposition of punitive damages. The only inferrable motive for Admiral's conduct is that Admiral consciously decided to perpetuate the hazard, because to eliminate it might have been costly, and to warn its customers might have adversely affected sales. Thus, solely for financial gain, Admiral deliberately exposed Mrs. Gillham to the fire hazard which, as was foreseeable [*sic*], caused a fire, burned her severely, and permanently ruined her life.

Brief for Plaintiff at 45, *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975).

481. 414 F. Supp. 255 (E.D. Pa. 1976).

\$475,000 compensatory and \$200,000 punitive damages against the manufacturer. The court upheld the compensatory damages award, but granted the defendant's motion for judgment n.o.v. on the punitive damages award, holding that the evidence was "insufficient as a matter of law to demonstrate that type of 'outrageous conduct' on which an award of punitive damages must depend." A "somewhat obscure reference in the medical literature" had indicated as early as 1959 that injuries to the cornea could result from electrical arcing on the uninsulated eyepiece. Although the particular eyepiece model that injured the plaintiff was designed to be used only with a camera, the defendant had known at least since 1969 that physicians were using the camera model eyepiece with the naked eye; yet it neglected until 1973 either to warn of the danger or to recall the camera model eyepieces for proper insulation.⁴⁸² In the seventeen years that the resectoscope had been on the market before the plaintiff's injury, however, the defendant had received only one report of a similar accident, and the user in that case suffered only a burned eyebrow.⁴⁸³

Such a long history of safe use suggests that the risk of injury from the product was very small. On the other hand, it probably would not have been too costly for the manufacturer to warn all known owners of this specialty instrument since the number was probably quite small and the defendant or its sales agents probably had records of their names and addresses. The jury in awarding punitive damages must have been convinced that the defendant knew of the danger by 1969 at the latest; that the danger plainly outweighed the cost of warning users of the product; and that consequently the defendant's failure to warn manifested a reckless disregard for the safety of users uninformed as to the risk. Nevertheless, in the absence of other evidence that the defendant knew its product contained a substantial risk of eye injury, the long period of safe use appears to justify the court's overruling of the punitive damages verdict.

The last recent case to be considered is *Scott v. Outboard Marine Corp.*⁴⁸⁴ In June 1970 two persons were riding in a nineteen foot, 210 horsepower inboard-outboard boat built by the defendant when the steering mechanism suddenly failed. The boat

482. Plaintiff's Memorandum in Opposition to Defendant's Motions for Judgment N.O.V. or for a New Trial at 12, *Thomas v. American Cystoscope Makers, Inc.*, cited note 481 *supra*.

483. Plaintiff's Memorandum of Law in Support of Claim for Punitive Damages at 2, *Thomas v. American Cystoscope Makers, Inc.*, cited note 481 *supra*.

484. Civil No. 71-1661 Civ JLK (S.D. Fla., filed Oct. 28, 1971).

spun out of control, threw the riders into the water and then struck them, killing one and seriously injuring the other. The failure resulted from a design defect in the steering system that made it particularly susceptible to corrosion.⁴⁸⁵ A company report in 1965 first indicated steering system failures caused by corrosion,⁴⁸⁶ and by early 1969 the company's main test facility was reporting similar failures with some frequency. For example, there were steering system failures in seven of seventeen boats of a particular model tested over an eighteen-month period. Other reports stressed both the seriousness of the danger and the need for an immediate remedy.⁴⁸⁷ One memorandum, prepared shortly after the steering on the boat of the chairman of the defendant's Board of Directors had failed in April 1969, stated prophetically: "One of these days, someone's going to get hurt—hope it isn't me."⁴⁸⁸

Recognizing the emergency nature of this problem, the defendant's engineering change committee in July 1969 ordered a simple design change: the substitution of a stainless steel retaining ring for the bronze one that had been causing the corrosion problems. The company decided the following month that the problem was serious enough to make the change on all boats held by the company and its distributors, generally wholly owned subsidiaries, but that the substitution, estimated to cost five dollars per boat for both materials and labor, should stop at that level. Thus, the defendant deliberately kept its dealers and existing owners ignorant of both the hazard and the simple, inexpensive means to eliminate it.⁴⁸⁹ The plaintiffs contended that the manufacturer's decision, probably made to protect its reputation and to save the relatively small expense involved in informing retailers and owners, manifested a conscious and flagrant indifference to the public safety.⁴⁹⁰

After thirty days of trial, the jury awarded the plaintiffs compen-

485. Memorandum in Support of Defendant's Motion for Partial Summary Judgment on the Claim for Punitive Damages at 4, *Scott v. Outboard Marine Corp.*, cited note 484 *supra*.

486. Supplemental Documents Filed in Opposition to Motion for Summary Judgment on the Issue of Punitive Damages, *Scott v. Outboard Marine Corp.*, cited note 484 *supra*, OMC "Progress Report" No. 9, Sept. 22, 1965.

487. Memorandum in Opposition to Defendant's Motion for Summary Judgment on the Issue of Punitive Damages at 22-25, *Scott v. Outboard Marine Corp.*, cited note 484 *supra*. One test report issued in 1969 indicated: "This creates a very dangerous condition Boat is thrown into severe port turn when this failure occurs." Another report stated that "[a] very serious problem with corrosion caused by dissimilar metals which must be remedied immediately." *Id.* at 23.

488. *Id.* at 22.

489. *Id.* at 25.

490. *Id.*

satory damages but denied them punitive damages.⁴⁹¹ Since the defendant was fully aware of many dangerous failures in boats already sold and thus consciously chose to ignore this risk of injury,⁴⁹² the jury would probably have been justified in awarding the plaintiffs punitive damages. Nevertheless, the jury was also probably acting within its sound discretion in refusing to award such damages. It may have concluded that the defendant's actions were not so culpable as to merit punishment because Outboard Marine, even though it knew of steering failures in its boats, had no notice the boats were actually causing injury.

The determinative factors in awarding punitive damages for post-marketing misconduct of manufacturers are largely the same as those in the other categories of marketing misconduct previously analyzed. The distinguishing feature of the post-marketing cases is that the results of the ultimate test of a product's safety—its performance during use by consumers—can be ascertained to help determine whether the product is in fact excessively dangerous. If its products are failing in a manner likely to produce severe injury, as in *Scott*, a manufacturer should seriously consider correcting the hazard. When defects are in fact causing injury, as in *Gillham*,⁴⁹³ the failure of the manufacturer to act promptly and decisively to reduce the danger is strong evidence that the manufacturer has little concern for consumer safety. But sending warning letters and recalling products are expensive procedures.⁴⁹⁴ Thus, before puni-

491. During the closing argument, counsel settled the claims for compensatory damages for a total of \$900,000: \$250,000 on the death claim and \$650,000 for the loss of leg injury claim. Upon agreement of counsel, the amounts of the compensatory damages verdicts returned by the jury were not revealed. Questionnaire returned from Jon E. Krupnick to David G. Owen, Aug. 1975.

492. However, the company finally sent recall notices to all known boat owners by certified mail three weeks prior to trial in 1972. *Id.*

493. See notes 474-80 *supra* and accompanying text.

494. The Minutes of a Product Safety meeting held at Outboard Marine Corp. on August 10, 1970 reflected the company's estimate that "it would cost between \$75,000 to \$100,000 for a field fix." Plaintiff's Exhibit 26, Feb. 1, 1972, *Scott v. Outboard Marine Corp.*, cited note 484 *supra*. The cost of a hypothetical automobile recall has been set at \$570,000. See Stone, *Allocation of Risk for Product Recall Expenditures: A Legislative Proposal*, 1975 U. DET. L.J. 24-25. The estimate may be unrealistically low. In a suit brought by Ford Motor Co. challenging an order of the National Highway Traffic Safety Administration to recall some 600,000 automobiles containing defective seat back pivot pins (to which 15-20 minor injuries had been attributed), Ford asserted that the cost of merely giving notice of the defect to all present owners would exceed \$500,000 and that the replacement of the seat pins would cost the company approximately \$31 per car or \$19 million in total. See *Ford Motor Co. v. Coleman*, 402 F. Supp. 475, 491, 494 (D.D.C. 1975) (three-judge court) (Hart, J., dissenting), *affd. without opinion*, 44 U.S.L.W. 3592 (U.S. April 19, 1976); 3 BNA PROD. SAFETY & LIAB. REP. 816 (1975). Moreover, an

tive damages will be appropriate in a post-marketing case, the probable reduction in the risk of harm from such remedial measures should clearly outweigh the cost to the manufacturer.

When a manufacturer learns of serious failures in the field, it is usually less costly to correct the defects in similar products not yet marketed than to recall products already on the market. Thus, the failure to remedy a known defect in products not yet marketed is particularly blameworthy. However, culpability will be less clear when the plaintiff is injured by a hazard not discovered by the manufacturer until after the particular product causing the injury has left its hands. The appropriateness of punitive damages in cases of this type will depend on the manufacturer's knowledge that its product is failing, the seriousness of the danger caused by the failures, and the practical and economic feasibility of remedying the defect. Punitive damages will be appropriate when a consideration of these factors demonstrates that the manufacturer's failure to take remedial action under all the circumstances was in flagrant disregard of the public safety.

B. *Toward a Standard of Responsibility*

The foregoing cases reveal varying degrees of manufacturer misbehavior in differing marketing contexts. In each case in which punitive damages were properly assessed, the manufacturer was shown to have grossly abused the power flowing from its position of control over product safety information in one of three ways: (1) by failing to acquire sufficient product safety information through tests, inspections or post-marketing safety monitoring; (2) by failing to remedy an excessively dangerous condition known to exist in a product by altering its design, adding warnings or instructions, or recalling the product for repair; or (3) by knowingly misleading the public concerning the product's safety.

Since the third form of misconduct is characterized by an intent to deceive and thus is akin to fraud, it cries out for punitive damages liability. However, the first two as described above are similar to mere negligence and thus are not always appropriate for such liability. Indeed, misbehavior akin to negligence and misbehavior

indirect but very real additional cost to the manufacturer will be the damage to the product image caused by the recall.

Professor Stone points out that the obligation of a manufacturer to recall its defective products should have some positive effects on product safety: "[I]f a person distributing unsafe goods has a financial *accountability* for recalling such goods, it will act as a deterrent to further producing unsafe products." Stone, *supra*, at 17 (emphasis in original). This is very probable in view of the magnitude of the potential liability.

deserving of punitive damages are similar in products liability cases in that both expose consumers to unreasonable risks of harm. Two additional elements are necessary, however, before a manufacturer's exposure of consumers to such risks may appropriately be punished by a punitive damages award. First, the manufacturer must be either aware of or culpably indifferent to an unnecessary risk of injury.⁴⁹⁵ Second, knowing that its product is or might be excessively dangerous, the manufacturer must intransigently refuse either to determine the seriousness of the danger or to reduce it to an acceptable level.⁴⁹⁶

This institutional "state of mind" is the key factor in assessing a manufacturer's culpability and hence in determining whether punitive damages are appropriate. When a manufacturer intentionally misleads consumers into believing that its product is safer than it actually is, punitive damages will almost always be in order.⁴⁹⁷ More difficult are the cases in which a manufacturer merely fails to discover possible product hazards, since the requisite state of mind generally exists only when it is known that the product is likely to cause serious harm if defective and when the means for discovering excessive dangers are inexpensive and readily available.⁴⁹⁸ Finally, there are the cases in which a manufacturer is aware of a particular danger yet fails to act affirmatively to reduce it.⁴⁹⁹ Punitive damages should be assessed in these situations only when it is further shown that the manufacturer was at least construc-

495. Manufacturing enterprises have awareness of product safety problems only through their employees. Awareness should be imputed to such an enterprise to the extent that it is possessed by an employee whose general responsibilities might fairly require him to act in response to the acquired information. In some situations in which the employee's responsibilities do not involve product safety, the proper response might be merely to relay the information to someone within the institution who is more directly concerned with such matters. In any enterprise, each member of upper management, the great majority of middle management, and selected members of the rank and file will have at least this type of general responsibility for passing along apparently significant information on product dangers. See notes 205-38 *supra* and accompanying text.

496. See *Boehm v. Fox*, 473 F.2d 445, 447 (10th Cir. 1973) ("Wantonness is characterized by a realization of the imminence of damage to others and a restraint from doing what is necessary to prevent the damage because of indifference to whether it occurs").

497. The MER/29 cases are of course the classic example. See notes 336-51 *supra* and accompanying text.

498. See, e.g., *Domich v. Jee's Juvenile Shop*, No. 225,782 (Super. Ct. Sacramento County, Cal., filed Aug. 28, 1972). See notes 407-10 *supra* and accompanying text. The Dalkon Shield cases may develop into the prototype for this class of misbehavior. See notes 395-97 *supra* and accompanying text.

499. *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976), is perhaps the best example of this form of misconduct. See notes 474-80 & 493 *supra* and accompanying text.

tively aware that the product was exposing customers to an unnecessarily high risk of harm in view of the relatively small cost of substantially reducing the risk. Thus, proof that the manufacturer was probably aware that its product might be defective often will include (1) the manufacturer's awareness that the product was inflicting, or was likely to inflict, substantial injury upon the public; and (2) the clear feasibility of substantially reducing the risk by adding a warning or changing the product's design. However, the plaintiff should not be obligated to establish the manufacturer's actual knowledge of this feasibility since a manufacturer completely indifferent to consumer safety may well have no idea how practical a risk-reduction program might be. Moreover, a manufacturer may fairly be presumed to have expert knowledge in its particular field and thus to be aware of the feasibility of reducing a particular danger, especially when the feasibility is clear.

Sanctions against manufacturers are appropriate in these situations because of the deliberate or reckless nature of the manufacturer's disregard of the welfare, indeed the rights,⁵⁰⁰ of the consuming public.⁵⁰¹ It is true that a manufacturer rarely consciously weighs its interest in marketing a product in a particular condition against the interests of consumers and then makes a deliberate decision to sacrifice the greater consumer good for its own lesser interest. Indeed, even the most extreme forms of manufacturer misbehavior ordinarily are more accurately classified as reckless than as intentional. Nevertheless, the reckless failure to test or to inspect a potentially hazardous product, to warn consumers of a hidden product danger, or to recall and to repair a product known to be dangerously defective, all amount to the same form of gross and deliberate disregard for the interests of others that should be sanctioned and deterred.⁵⁰²

500. See notes 169-71 *supra* and accompanying text.

501. More specifically, what deserves to be punished and needs to be deterred is the conscious or reckless and excessive sacrifice of the public's interest in remaining free of unnecessary personal injury for the manufacturer's interest in enhancing its profits.

502. Punitive damages generally are awardable in most jurisdictions upon a showing of either conscious or reckless misconduct. "Reckless indifference to the rights of others, and conscious action in deliberate disregard of them . . . may provide the necessary state of mind to justify punitive damages." RESTATEMENT (SECOND) OF TORTS § 908, Comment *b* at 80 (Tent. Draft No. 19, 1973). The difference between the notions of "conscious" and "reckless"—or "willful" and "wanton"—disregard for the interests of others is practicably indiscernable in many contexts. This is especially true in the products liability cases involving gross forms of marketing misbehavior. Accordingly, no sound basis will ordinarily exist for distinguishing among these concepts in products liability litigation where the recurring forms of misconduct can be characterized with equal accuracy as either conscious or reckless. This will not be true, of course, if a court gives an unduly restrictive interpretation

The variety of situations in which manufacturer misconduct may arise makes it particularly important that a standard be formulated so that courts and juries can identify cases in which punitive damages should be awarded. Most products liability cases articulating such a standard have adopted traditional punitive damages phraseology, such as "wilful and wanton,"⁵⁰³ "malice, oppression, or gross negligence,"⁵⁰⁴ or "ill will, . . . actual malice, or . . . under circumstances amounting to fraud or oppression."⁵⁰⁵ But these traditional tests

to the notions of the consciousness or deliberateness of the manufacturer's misbehavior. "The requisite intent that must be shown . . . is that the defendant deliberately injured the plaintiff or that the defendant deliberately performed an act which he knew to be substantially certain to result in injury to the public." *Rosendin v. Avco Lycoming Div.*, Cal. Ct. App., 1st App. Dist., Div. 3 at 66 (unpublished opinion filed Feb. 24, 1976); see *G.D. Searle & Co. v. Superior Ct.*, 49 Cal. App. 3d 22, 29-30, 122 Cal. Rptr. 218, 222-23 (1975); *Drayton v. Jiffee Chem. Corp.*, 395 F. Supp. 1081, 1097 (N.D. Ohio 1975) (punitive damages liability requires showing of defendant's "[a]ctual or express malice [which] has been defined as that state of mind under which a person's conduct is characterized by hatred or ill will, a spirit of revenge, retaliation, or a determination to vent his feelings upon other persons"). Narrowly defining the standard of liability in this manner renders the punitive damages remedy unavailable for use in products liability litigation as a practical matter and consequently frustrates the achievement of the underlying goals of the doctrine.

503. *Moore v. Jewell Tea Co.*, 116 Ill. App. 2d 109, 135, 253 N.E.2d 636, 648 (1969), *affd.*, 46 Ill. 2d 288, 263 N.E.2d 103 (1970). "The question of willful and wanton conduct is essentially whether the failure to exercise care is so gross that it shows a lack of regard for the safety of others." 116 Ill. App. 2d at 136, 253 N.E.2d at 649.

504. *Vollert v. Summa Corp.*, 389 F. Supp. 1348, 1352 n.13 (D. Hawaii 1975).

505. *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 711, 60 Cal. Rptr. 398, 414 (1967). The California punitive damages statute applied by the court in *Toole* allows such damages where the defendant is guilty of "oppression, fraud, or malice." The word "malice" in the statute has been interpreted to mean "malice in fact." The *Toole* court interpreted the malice in fact requirement broadly, holding that it "may be established by a showing that the defendant's wrongful conduct was wilful, intentional, and done in reckless disregard of its possible results. Where, as here, there is evidence that the conduct in question is taken recklessly and without regard to its injurious consequences, the jury may find malice in fact." 251 Cal. App. 2d at 715, 60 Cal. Rptr. at 416. The court concluded that the evidence was sufficient to support a jury finding that the defendant had "acted recklessly and in wanton disregard of possible harm to others in marketing, promoting, selling and maintaining [the product] on the market in view of its knowledge" of its harmful effects. 251 Cal. App. 2d at 715, 60 Cal. Rptr. at 416. However, this liberal interpretation of the "malice in fact" requirement in the products liability context was rejected by another California court in *G.D. Searle & Co. v. Superior Ct.*, 49 Cal. App. 3d 22, 32, 122 Cal. Rptr. 218, 224 (1975).

Other standards of punitive damages liability articulated in the products liability cases include the following: *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976) ("so intentional, reckless, wanton, willful, or gross that an inference of malice could be drawn," 523 F.2d at 109; "reckless indifference to the safety of others," 523 F.2d at 109 n.4); *Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132 (3d Cir. 1973) ("reckless indifference to the public's safety," 485 F.2d at 146; "reckless disregard of the public's health," 485 F.2d at 147); *Kritser v. Beech Aircraft Corp.*, 479 F.2d 1089, 1097 (5th Cir. 1973) ("conscious indifference toward the public which generally typifies gross negligence"); *Boehm v. Fox*, 473 F.2d 445, 447 (10th Cir. 1973) ("malice, fraud, or a willful

of liability were originally designed to cover interpersonal intentional torts or oppressive misconduct by government officials exhibiting personal hostility or a callous abuse of power.⁵⁰⁶ In each of the cases examined above in which the manufacturer's marketing behavior was sufficiently culpable to deserve the sanction of punitive damages, the particular misconduct could fairly be characterized as "wanton" or "oppressive."⁵⁰⁷ Yet a more comprehensive and more clearly defined standard is needed in the products liability context.

Several courts have attempted to refine these tests by defining the proscribed marketing behavior as conduct that is in "conscious" or "reckless" disregard of the public safety.⁵⁰⁸ This standard appropriately identifies the "public safety" as the particular interest invaded by the defendant in a products liability case and the requisite

and wanton disregard of the rights of others"); *Thomas v. American Cystoscope Makers, Inc.*, 414 F. Supp. 255 (E.D. Pa. 1976), *appeal docketed*, No. 76-1780, 3d Cir., June 21, 1976 ("recklessness" defined as "a readily perceptible danger and a conscious choice on the part of the alleged wrongdoer to act despite clear knowledge of a highly probable risk of serious harm," 414 F. Supp. at 266; "outrageous conduct," 414 F. Supp. at 267); *Drayton v. Jiffie Chem. Corp.*, 395 F. Supp. 1081, 1098 (N.D. Ohio 1975) ("willful or wanton"; *but see* note 502 *supra*); *Hoffman v. Sterling Drug, Inc.*, 374 F. Supp. 850, 856 n.4 (M.D. Pa. 1974) ("wanton disregard for safety"); *Drake v. Wham-O Mfg. Co.*, 373 F. Supp. 608, 610 (E.D. Wis. 1974) ("wanton, willful or reckless disregard of the plaintiff's rights"); *G.D. Searle & Co. v. Superior Ct.*, 49 Cal. App. 3d 22, 33, 122 Cal. Rptr. 218, 225 (1975) ("conscious disregard of the safety of others" (emphasis omitted)); *Pease v. Beech Aircraft Corp.*, 38 Cal. App. 3d 450, 465-66, 113 Cal. Rptr. 416, 426 (1974) ("willful and wanton indifference to the safety of persons who might use the [product]"); *Fleet v. Hollenkemp*, 52 Ky. 175, 180, 13 B. Mon. 219, 226 (1852) (exemplary damages should depend on the "nature and extent of the injury done and the manner in which it was inflicted, whether by negligence, wantonness, or with or without malice"); *Hawes v. General Motors Corp.*, No. 76 CP 2551 (C.P. Hampton County, S.C., filed March 12, 1976) ("so gross as to amount to recklessness or wantonness") (unpublished Order at 7, June 10, 1976).

506. *See* 1 T. SEDGWICK, *supra* note 16, at 687-94.

507. Perhaps the principal characteristic of oppression is the abuse of power over the welfare of others. This was indeed the hallmark of the misconduct for which punitive damages were allowed in the first case in Anglo-American law expressly allowing such damages. *Huckle v. Money*, 2 Wils. 205 (K.B. 1763). This is also the fundamental characteristic of the grosser forms of marketing misconduct by manufacturers. The power abused in cases of this type is that which the manufacturer holds by virtue of its near-monopolistic control over the means for gathering and applying information concerning product dangers. *See* note 69 *supra*. Gross abuse of the control over information vital to the well-being of others is oppressive misbehavior; flagrant marketing misbehavior by a manufacturer thus quite cleanly falls within the scope of the phrase "oppression, fraud, or malice" used to describe the standard of liability in the punitive damages statutes of California and several other states. *See* notes 23, 443 *supra*. Moreover, such conduct might even loosely be properly characterized as "public fraud," *see* *Pease v. Beech Aircraft Corp.*, 38 Cal. App. 3d 450, 465, 113 Cal. Rptr. 416, 426 (1974) ("fraud upon the public"), or perhaps as "social malice." Social malice of this type is most certainly classifiable as malice in fact. *See* *Hopkins v. The Railroad*, 36 N.H. 9, 19 (1857) ("Gross carelessness, where duty to the public requires the utmost care . . . has certainly a strong character of cruelty and moral turpitude").

state of mind accompanying the invasion as "conscious" or "reckless." But the phrase "conscious disregard"⁵⁰⁹ is too restrictive, for it implies a subjective test of deliberateness of wrongdoing that is too narrow in scope and too difficult to prove. Such a standard would permit manufacturers to escape punitive damages liability in many cases of egregious misbehavior. Moreover, the phrase "conscious disregard" suggests an institutional decision or attitude adopted by the managerial officers of the enterprise, a notion at odds with the broader and more appropriate vicarious liability rule.⁵¹⁰ "Reckless disregard," on the other hand, is arguably too easily confused with truly inadvertent conduct⁵¹¹ and for this reason is in some jurisdictions rejected as the basis for punitive damages liability.⁵¹²

Other language that more precisely identifies the nature of the proscribed conduct is available. It is helpful in formulating such a standard to refer to the two predominant characteristics of the misbehavior revealed in the cases studied above in which punitive damages were most appropriate. The first is the manufacturer's lack of concern for the public safety, a spirit of utter indifference to whether the product might cause unnecessary injuries. The second characteristic is the flagrancy of this indifference as reflected by the extent of the manufacturer's awareness of the danger and its excessiveness, the over-all magnitude of the danger to the public, the ease of reducing the risk, and the motives and other circumstances attending the manufacturer's failure to reduce the risk.⁵¹³ These

508. See notes 503-05 *supra* and accompanying text.

509. The most carefully considered products liability opinion adopting a conscious disregard standard is *G.D. Searle & Co. v. Superior Ct.*, 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975). But see note 505 *supra*.

510. The vicarious liability rule is proposed above as the appropriate rule of enterprise responsibility in products liability cases. See notes 205-38 *supra* and accompanying text & note 495 *supra*.

511. The court in *G.D. Searle & Co. v. Superior Ct.*, 49 Cal. App. 3d 22, 31, 122 Cal. Rptr. 218, 224 (1975), noted

the synonymy sometimes ascribed to nonsynonymous terms. Typical is *Toole v. Richardson-Merrell*, *supra*. There the court declared that malice may be established by evidence of conduct which is "wilful, intentional, and done in reckless disregard of its possible results." According to dictionary definitions, willfulness and intent denote deliberation or design; recklessness, in contrast connotes action which is insensate, heedless or negligent. To apply these adjectives conjunctively to a single course of conduct is self-contradictory. "If conduct is negligent, it is not willful; if it is willful, it is not negligent." (Footnotes omitted.)

But see *Rogers v. Florence Printing Co.*, 233 S.C. 567, 578, 106 S.E.2d 258, 264 (1958) (no "real difference" between "gross disregard" and "conscious indifference"). See generally *RESTATEMENT (SECOND) OF TORTS* § 500 (1965) (recklessness involves risk that is "substantially greater than that which is necessary to make [the] conduct negligent").

512. See note 30 *supra*.

513. See note 516 *infra*.

two characteristics—the manufacturer's indifference and its flagrancy—can form a standard of punitive damages liability tailored to fit the specific needs of products liability litigation: Punitive damages may be assessed against the manufacturer of a product injuring the plaintiff if the injury is attributable to conduct that reflects a flagrant indifference to the public safety.

Several aspects of this proposed standard should be noted. First, the standard does not expressly require that the product causing the injury be "defective." While most cases giving rise to punitive damages liability under the standard will involve a product that is legally defective,⁵¹⁴ the standard is designed specifically to include cases of fraudulent-type misbehavior that do not always fit comfortably into the defectiveness mold.⁵¹⁵ Moreover, much of the defectiveness notion is implicitly subsumed within the core idea of "flagrant indifference."⁵¹⁶ Finally, "defectiveness" is often a complex and confusing issue that will already have been determined favorably to the plaintiff before any consideration of punitive damages liability. Thus, while a product's defectiveness will in a sense be an implicit prerequisite to liability under the standard,⁵¹⁷ the omission of an explicit reference should facilitate a clearer analysis of the other issues more germane to determining punitive damages.

Also important to the standard are its two causation requirements. First, plaintiffs seeking punitive damages must have been persons injured by the product. This approach is consistent with the general punitive damages rule in most jurisdictions under which a plaintiff must establish his right to compensatory damages as a condition to recovering punitive damages.⁵¹⁸ Second, plaintiffs must further establish some causal connection between the alleged marketing misconduct and the injury. The phrase "attributable to" rather than the phrase "caused by" is used to describe this causal

514. *But cf.* E.R. Squibb & Sons, Inc. v. Stickney, 274 S.2d 898 (Ct. App. Fla. 1973), *cert. denied*, 416 U.S. 961 (1974). See notes 352-69 *supra* and accompanying text.

515. See note 335 *supra* and accompanying text & note 443 *supra*.

516. Marketing misconduct that reflects a flagrant indifference to the public safety will usually embrace the factors used to determine defectiveness under the cost-benefit method, specifically, the magnitude of the public danger and the cost of reducing the risk. See note 3 *supra*. A product would very probably be classified as defective under the other theories of defectiveness in a case properly giving rise to a punitive damages assessment under the standard proposed above.

517. Since punitive damages cannot be awarded at all without some form of liability having been established against the defendant, see D. DOBBS, *supra* note 16, at 208-10, the plaintiff seeking punitive damages in a products liability case will in most cases have to establish the "defectiveness" of the product in any event.

518. See C. McCORMICK, *supra* note 16, at § 83. *But see, e.g.*, Gill v. Manuel, 488 F.2d 799, 802 (9th Cir. 1973).

requirement and to emphasize that a punitive damages claim should not be rejected when the plaintiff has difficulty proving causation under the strict common-law principles applicable to compensatory claims but can nevertheless show a real and substantial connection between the misconduct and the injury.⁵¹⁹ The stretching of the normal rules of causation in cases of aggravated misconduct has long been recognized as appropriate and is properly included in a standard for punitive damages liability.⁵²⁰

Central to the standard is the imposition of punitive damages liability for marketing conduct "reflecting a flagrant indifference to the public safety." This phrase can best be analyzed by considering separately the terms "reflecting," "indifference" and "flagrant." The word "reflecting" calls for an objective determination of the manufacturer's apparent attitude rather than a subjective determination of the manufacturer's actual state of mind.⁵²¹ This is appropriate for three reasons. First, a manufacturer's "state of mind" is an ethereal concept that is difficult to prove.⁵²² Second, it is quite unlikely that a manufacturer can ever be acting in good faith when it seriously endangers the public through grossly irresponsible conduct.⁵²³ Third, the manufacturer's subjective state of mind is largely irrelevant to the basic question of whether there is a social need to deter such misbehavior.⁵²⁴

"Indifference" to the public safety⁵²⁵ conveys the idea that the manufacturer simply does not care whether or to what extent the public safety may be endangered by its product despite the availability of feasible means to reduce the danger substantially. It implies a basic disrespect and consequent disregard for the interests of others.

The word "flagrant" describes the final key concept in the standard⁵²⁶ and serves principally to limit its scope. The word connotes

519. This problem is present in some cases of the fraudulent-type misconduct. See note 443 *supra*.

520. See note 42 *supra*.

521. But see *Thomas v. American Cystoscope Makers, Inc.*, 414 F. Supp. 255, 267 (E.D. Pa. 1976) *appeal docketed*, No. 76-1830, 3d Cir., June 21, 1976 ("[T]hat subjective kind of awareness . . . is the distinguishing element of reckless conduct").

522. See text at note 527 *infra*.

523. See note 507 *supra*.

524. See notes 129-51 *supra* and accompanying text.

525. The word "indifference" conveys essentially the same idea as "disregard" as applied to the public safety. However, it is arguable that the word "indifference" more clearly underscores the generalized nature of the defendant's lack of concern for the consequences of its marketing activity, as exemplified by cases involving reckless failure to discover product dangers.

526. Surprisingly, the word flagrant is used infrequently in the punitive damages

misconduct significantly more serious than inadvertent negligence and thus assures that only the most egregious misbehavior is punished. Yet it does not call for proof of a subjective awareness of wrongdoing that the word "conscious" implicitly requires.⁵²⁷ Instead, the word imputes such awareness to the manufacturer when its conduct is obviously and seriously wrong. Additionally, the word "flagrant" is not burdened with the emotional overtones of the more generally accepted word "outrageous."⁵²⁸ Finally, a standard based on "flagrant" misconduct appears at once to be sufficiently flexible to fit varying factual contexts yet definite enough to provide reasonable predictability.

As is frequently true whenever a complex balancing of social interests is reduced to a one-sentence test, the proposed standard will be better administered if its elements are isolated. Thus, the following factors may properly be considered to determine whether a manufacturer's conduct reflects a flagrant indifference to the public safety.⁵²⁹

- (1) the existence and magnitude in the product of a danger to the public;
- (2) the cost and feasibility of reducing the danger to an acceptable level;
- (3) the manufacturer's awareness of the danger, of the magnitude of the danger, and of the availability of a feasible remedy;
- (4) the nature and duration of, and the reasons for, the manufacturer's failure to act appropriately to discover or to reduce the danger; and
- (5) the extent to which the manufacturer purposefully created the danger.

Each factor will be discussed briefly. First, a manufacturer's fault in failing to deal with a product hazard increases with the magnitude of the resulting potential for harm to the public.⁵³⁰ Second, as the

cases. When it does appear, it is usually used as merely one of two or more modifiers for the described misconduct. *See, e.g.,* *Certified Laboratories of Texas, Inc. v. Robinson*, 303 F. Supp. 1014, 1028-29 (E.D. Pa. 1969); *Ingram v. Pettit*, 303 S.2d 703, 704 (Fla. App. 1974); *Soucy v. Greyhound Corp.*, 27 App. Div. 2d 112, 113, 276 N.Y.S.2d 173, 175 (1967). *See also* UNIFORM STATE ANTITRUST ACT § 8(b) (1973) (treble damages for "flagrant" violations).

527. *See* notes 522-24 *supra* and accompanying text.

528. *See* note 304 *supra*.

529. The factors relevant to the basic determination of whether punitive damages should be assessed at all in products liability cases reflect many of the considerations pertinent to the measurement of such awards. *See* notes 281-99 *supra* and accompanying text.

530. *See* notes 286 and 291 *supra* and accompanying text. Except for *Hafner*

costs of reducing such a hazard to an acceptable level diminish, so also does the credibility of excuses for failing to do so. Third, as the manufacturer's awareness of the existence, magnitude, and means to reduce a product hazard increases, so too does its duty to address the problem and its culpability for failing to do so.⁵³¹ Fourth, the nature and duration of a manufacturer's failure to respond appropriately to a product hazard, its reasons for not responding more appropriately, and the nature and extent of any measures actually taken, all shed light on the extent to which the enterprise values profits over safety, and, accordingly, on its culpability. Finally, if the manufacturer created the danger deliberately, as by knowingly deceiving the public about the product's safety, it will usually be especially blameworthy and deserving of punishment.⁵³²

The determination of whether the marketing conduct of the manufacturer in any particular case reflected a flagrant indifference

v. Guerlain, Inc., 34 App. Div. 2d 162, 310 N.Y.S.2d 141 (Sup. Ct. 1970), in which the punitive damages verdict for the plaintiff was reversed on appeal, no cases have been located assessing punitive damages against a manufacturer where the plaintiff received only minor injuries. However, cases of consumers regularly receiving small injuries from a product, such as cuts from sharp or raw edges, involve an aggregate harm to the public far exceeding the small injuries to the individual consumers. If a manufacturer were aware of such a tendency in its product and failed to take steps to reduce the hazard, the inaction might well reflect a flagrant indifference to the public safety for which a punitive damages assessment against the manufacturer would be appropriate. Furthermore, punitive damages assessments are probably the only effective means to deter such misconduct because of the economic infeasibility of litigating cases of this type for compensatory damages alone. See notes 150-51, 178-80 *supra* and accompanying text.

531. An enterprise will be put on notice of a product danger upon receipt of a complaint of injury or near-injury from a single consumer. The more complaints received by the manufacturer concerning a specific danger, the greater will be its awareness of the existence, magnitude, and possible excessiveness of the hazard. Failing to maintain a complaint file or otherwise acting irresponsibly would itself be evidence of a manufacturer's indifference to the public safety. See note 470 *supra*. A rule has been proposed by the Consumer Product Safety Commission under § 16(b) of the Consumer Product Safety Act, 15 U.S.C. § 2065(b) (Supp. IV 1974), requiring manufacturers to maintain files of consumer complaints. 39 Fed. Reg. 31,916 (1974); CCH CONS. PROD. SAFETY GUIDE ¶ 40,118. Unfortunately, the proposed rule has not been adopted. But see Consumer Product Safety Commission Improvements Act of 1976 § 13(a)(1), Publ. L. No. 94-284 (May 11, 1976), amending Consumer Product Safety Act § 19, 15 U.S.C. §§ 2051-2081 (1970), making it a "prohibited act" to "fail or refuse to establish or maintain records."

Additionally, section 15(b) of the Act, 15 U.S.C. § 2064(b) (Supp. IV 1974), requires product sellers immediately to inform the Commission upon receipt of information concerning a substantial product hazard. The Commission requires notice "within 24 hours after a reporting company has obtained information which reasonably supports the conclusion that the product could create a substantial hazard." 3 BNA PROD. SAFETY & LIAB. REP. 692 (1975). "Section 15(b) notifications are routinely made available to the public . . ." 41 Fed. Reg. 16,574 (1976). See 4 BNA PROD. SAFETY & LIAB. REP. 338 (1976).

532. Plaintiffs will not be able nor of course should they be required to establish deliberate misconduct of this type in all cases in which punitive damages will be appropriate. See text at note 527 *supra*.

to the public safety will often be difficult, but the task should be facilitated by examining the facts of each case within the framework outlined above. The guiding factors that have been proposed should help determine the appropriateness of punitive damages in a products liability case.

V. CONCLUSION

Modern products liability theory requires manufacturers to pay for injuries caused by defects in their products. The threat of liability and an interest in preserving their good reputation often induce manufacturers to guard against marketing products that are apt to be defective. But occasionally manufacturers fail to take even the most basic steps to discover hazards. In other instances manufacturers actually aware of serious product hazards refuse to adopt feasible and inexpensive corrective measures plainly called for in light of the substantial risk of harm presented. And on rare occasions manufacturers deliberately conceal substantial dangers to enhance the marketability of their products. These types of marketing behavior reflect a flagrant indifference to the public safety that should be punished and deterred.

While the criminal law has thus far left this type of marketing misconduct virtually untouched, the punitive damages remedy has lately begun to fill the void by undercutting the profitability of marketing misbehavior. By making the flagrant disregard of the public safety costly, the punitive damages remedy converts the profit motive into a positive force for the promotion of optimal product safety.

The assimilation of the punitive damages remedy into the field of products liability has just begun. This blending of distinct doctrines with separate functions cannot be expected to occur without producing a few rough edges. But time and experience will demonstrate that the union is sound.